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## Lawyer Role, Agency Law, and the Characterization “Officer of the Court”

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The law of agency has governed American lawyers since before the Revolution, but recent scholarship about legal ethics and professional role almost entirely ignores it. Most commentators would concede that attorneys are agents, but would quickly add that the lawyer is also an “officer of the court” who has obligations to seek justice. However, analysis of the phrase “officer of the court” reveals that it has surprisingly little content; it is mostly rhetoric, caused by self-love and self-promotion. What little content it has points to a role of the attorney as agent whose obligations to the court are almost identical to those owed by non-lawyers and almost entirely consistent with duties to clients.

By largely ignoring agency law, and failing to thoroughly examine the attorney’s role as an “officer of the court,” commentators have mistakenly grounded wide ranging arguments that lawyers must seek “justice” because they are officers of the court who have a special obligation to seek justice. Indeed, they argue that the lawyer’s duty to seek justice is superior to the obligation of loyalty and zealous advocacy on behalf of the client. In their view, there are situations in which the lawyer’s duty as an “officer of the court” empowers her to disobey the client’s lawful instructions because following them would not promote

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justice. Proponents of this "moral activist" role have overlooked or misapprehended the importance of agency law and uncritically exaggerated the role of lawyer as an "officer of the court." Acceptance of their arguments would, moreover, profoundly change the attorney's role from that of agent for a client to that of agent for "justice." This would create a system that would allow the lawyer to substitute her moral beliefs for her client's lawful instructions.

As it applies to the representation of clients, analysis of the characterization "officer of the court" reveals that the term consists of process obligations which are wholly consistent with fundamental principles of agency law—including the duty of zealous advocacy. Therefore, in our adversary system the lawyer's duty to the court is almost entirely harmonious with the lawyer's duty as agent for her client.

Lawyers do perform a screening or gate-keeping function for the courts, society, and clients. Allegations or responses that are without foundation may not be made. Courts, therefore, have some assurance that complaints and defenses have some merit. However, non-lawyers are also prohibited from making claims or asserting defenses that are without merit, thus, lawyers do not have a special, or unique gate-keeping role.

Moreover, there is little historical support for the existence of a lawyer's substantive duty to seek justice that would trump the duties of loyalty and obedience to clients. As early as the 13th century, in medieval England, attorneys were considered "officers of the courts"; but this role did not impose responsibilities on attorneys that were inconsistent with duties owed to clients or different than the obligations to the legal system borne by non-lawyers. Essentially, attorneys were prohibited from engaging in criminal conduct. While not perfectly clear, the history in ancient Greece and the Roman Empire does not suggest that those performing as lawyers (or an aspect of the lawyer's role as in Greece) owed any obligations to the courts or society that were at odds with duties owed to clients or different than duties of ordinary citizens. There is considerably more information available in America—and thus more room for dispute. Nevertheless, an examination of our history reveals the source of the empty and self-serving rhetoric. History also shows that the lawyer's controlling role identity is as an agent whose duties to the

court, or to seek justice, are almost entirely process oriented and compatible with the duties owed to clients.

Agency law is the proper framework for analyzing lawyer role because it offers a rich well-established structure for understanding and determining attorney role and professional ethics and is grounded in a long and established history. Attorneys are nonemployee, or independent contractor, agents, who are engaged by principals seeking their discretion, expertise, judgment, and skill. The agent's duty of obedience requires that the instructions of the principal regarding goals or objectives of the agency relation be followed. The duty of obedience is not absolute. Agents have the discretion to select the means to accomplish client objectives. Under some circumstances, agents may decline to follow instructions that interfere with attainment of the client's goals or are unlawful. Consistent with agency principles, attorney ethics codes may be best understood as the expression of collective wisdom on the exercise of the attorney-agent's discretion. The fact that lawyers are agents reinforces the conclusion that the concept "officer of the court" does not include a substantive duty to seek justice independent of the duty of loyalty owed to clients.

This article will demonstrate that agency law provides a sound framework for examining even the most vexing ethical and role issues. In particular, the role issues at the junction of zealous advocate and "officer of the court" are explored. In Part I, the concept "officer of the court" is examined to determine its content. The attempt by prominent commentators to ground a substantive duty to seek justice in the lawyer's role as an "officer of the court" is noted and then critically examined from a historical and modern perspective. The 19th century writers David Hoffman, and George Sharswood, considered the father of legal ethics, are scrutinized. Then, attorney as an "officer of the court" in medieval England, the Roman Empire, and Greece is briefly discussed.

In Part II, agency law and the role of the lawyer as agent will be discussed. A short historical excursion to ancient Greece, Rome, and England will be taken to show the role of the lawyer as agent in those societies. We will discover that common to all three societies is a role in which an individual assists a party in legal proceedings at the party's direction. Finally, Part III, examines agency law to

determine if it can provide content to the label "officer of the court." Also discussed in Part III is whether the lawyer's role within our adversary system should ever include a substantive duty to the court to seek justice that is inconsistent with the duty of client loyalty.

## I. THE CHARACTERIZATION "OFFICER OF THE COURT"

### A. *Introduction*<sup>1</sup>

A major component of the attorney's role is defined by her right to appear in court on the behalf of clients.<sup>2</sup> Because of admission, regulation, and role, lawyers are part of the justice system; as licensed participants they are universally considered "officers of the court."<sup>3</sup> Only lawyers are privileged to practice in court on behalf of others and, therefore, must bear certain obligations.<sup>4</sup> By virtue of the privilege of practicing in the courts, lawyers support the administration of justice.<sup>5</sup>

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1. At the outset, it is important to acknowledge that attorneys have always filled many roles other than the representation of private clients. In these roles, attorneys have made substantial contributions to the justice system in particular and society in general. Lawyers serve as community and government leaders in legislatures, executive offices, and of course, the judiciary. Lawyers also play significant law reform roles in bar associations. But in these roles the lawyer is not obligated by duties to clients and is thus free to contribute in any way seen fit. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.4 cmt. (1983) (stating that lawyers participating in law reform work must protect the integrity of program by disclosure if interests of private client would be materially benefitted) [hereinafter MODEL RULES].

2. "Clients" refers to non-governmental clients. Most clients will not want to become (or remain) clients if their cause has too little merit and thus a gate-keeping function benefits them. For individuals who wish to proceed despite the absence of merit the short answer is that neither clients or attorneys may utilize non-meritorious claims or responses. See *infra* notes 178-89 and accompanying text.

3. See *In re Integration of Nebraska State Bar Ass'n*, 275 N.W. 265, 268 (Neb. 1937); see also *Ohralik v. Ohio State Bar Assoc.*, 436 U.S. 447, 460 (1978) ("[L]awyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts' [and] act as trusted agents of their clients.").

4. In some jurisdictions and substantive areas of law, non-lawyers are permitted to appear before administrative tribunals and courts as lay advocates. For example, in certain hearings in the benefits area petitioners are permitted to be represented by non-lawyers and in applications for protection orders lay advocates often appear.

5. See *In re Integration of Nebraska State Bar Ass'n*, 275 N.W. at 268.



Few have scrutinized the label "officer of the court" carefully, let alone from a scholarly perspective.<sup>6</sup> However, it is common currency in the speeches of Bar Leaders, Law Day presentations,<sup>7</sup> memorials to prominent lawyers and judges, and judicial opinions. Considering that all attorney conduct is subject to court review<sup>8</sup> and the disciplinary authority of the court,<sup>9</sup> attorneys could be acting in their role as "officers of the court" at all times. Such a broad conceptualization, however, gives little body to the phrase. Lawyers have certain duties to their clients that do not directly involve courts,<sup>10</sup> duties to courts or tribunals that do not directly involve clients,<sup>11</sup> and duties as citizens. More productively, the range of attorney's duties can be broken down into three categories: (1) duties to courts, (2) duties to clients, and (3) duties to others.<sup>12</sup>

The image of lawyer as loyal and zealous client protector<sup>13</sup> (also bedeviled by its own rhetoric)<sup>14</sup> is normally

6. Professor Gaetke is an exception. See Eugene R. Gaetke, *Lawyers as Officers of the Court*, 42 VAND. L. REV. 39 (1989).

7. See Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 13 (1988) [hereinafter Gordon, *Independence*] (stating that when lawyers talk about "public duties, being officers of the court and so on, most of us understand that we have left ordinary life far behind for the hazy aspirational world of the Law Day sermon and Bar Association after-dinner speech—inspirational, boozily solemn, anything but real").

8. See, e.g., MODEL RULES, *supra* note 1, Rule 8.4(d) (stating that a lawyer has committed professional misconduct by acting in a way that is prejudicial to the administration of justice); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-102(A)(5) (1969) [hereinafter MODEL CODE].

9. See, e.g., MODEL RULES, *supra* note 1, Rule 8.5 (stating that a lawyer is subject to the disciplinary authority of jurisdiction where admitted).

10. See, e.g., *id.* Rule 2.2 (lawyer as intermediary). In addition, lawyers serve as advisors in a variety of transactional settings normally having nothing to do with courts.

11. *Id.*; see, e.g., *id.* Rule 8.3 (discussing duty to report professional misconduct).

12. Cf. MODEL RULES, *supra* note 1, preamble. See generally *infra* notes 163, 172, 173, 187-95 and accompanying text.

13. In what has become the archetypical description of loyalty and zealous advocacy, Lord Henry Brougham described this view of the lawyer's role in connection with his defense of Queen Caroline:

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save the client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of the consequences, though

juxtaposed against rhetoric about attorneys as “officers of the court,” leaving attorneys not knowing which master to serve and when. Tension is said to exist because zealous advocacy on behalf of clients on occasion conflicts with the lawyer’s responsibilities to the court and the public.<sup>15</sup> When there is a conflict, the attorney’s duty as an “officer of the court” trumps the lawyer’s duty to the client.<sup>16</sup> Attempts to reconcile the purported conflict between zealous advocacy and the duty to the court to seek justice has absorbed commentators on professional role for many years.<sup>17</sup> Discovering the meaning of the concept and separating it

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it be his unhappy fate to involve his country in confusion.

2 TRIAL OF QUEEN CAROLINE 8 (J. Nightingale ed. 1821).

14. Lord Henry Brougham’s famous statement has generated a mountain of rhetoric in favor and against. Professor Monroe H. Freedman is probably his most prolific and outspoken adherent. See generally MONROE H. FREEDMAN, UNDERSTANDING LAWYERS’ ETHICS 1 (1990); Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966). Opponents include, *inter alia*, M.H. Hoeflich, *Legal Ethics in the 19th Century: The “Other Tradition,”* 47 U. KAN. L. REV. 793, 795 (1999) (claiming that Lord Brougham’s oft repeated statement was “the most extreme view to that point ever expounded”). Dean Hoeflich further claims that Brougham’s view was “contradictory to the medieval tradition of legal ethics,” inconsistent with Blackstone’s view, and in the United States “attacked [by] contemporaries and successors as being utterly inappropriate.” *Id.* Unfortunately, it is difficult to evaluate these claims because we are not referred to any authoritative source other than one reference to Sharswood who is first slightly critical of Lord Brougham’s statement but quickly qualifies his criticism. See SHARSWOOD, *infra* note 90, at 87.

15. See Gaetke, *supra* note 6, at 40-41 (noting that there are “two antagonistic models” of the role of lawyer in our system: (1) the lawyer as zealous advocate, “the devoted champion of the client’s cause,” and (2) as officers of the court); Robert W. Gordon, *The Ethical Worlds of Large-Firm Litigators: Preliminary Observations*, 67 FORDHAM L. REV. 709, 728 (1998) [hereinafter Gordon, *Ethical Worlds*] (claiming that lawyers understood the “zealous advocacy norm” and duties as “officers of the courts” were “general obligations in permanent tension, which must be balanced against one another”; but now advocacy is the “master norm”); ROBERT W. GORDON, LAWYERS AS THE AMERICAN ARISTOCRACY (1998); see also Craig Enoch, *Incivility in the Legal System? Maybe It’s the Rules*, 47 SMU L. REV. 199, 201 (1994).

16. See *infra* notes 19-25 and accompanying text.

17. See, e.g., Gordon, *Independence*, *supra* note 7, at 20 n.59; David B. Wilkins, *Do Clients have Ethical Obligations to Lawyers? Some Lessons from the Diversity Wars*, 11 GEO. J. LEGAL ETHICS 855 (1998) (“Since time immemorial, legal ethics discourse has been preoccupied with one central question: what are the ethical limitations on the obligations lawyers owe their clients?”); Susan D. Carle, *Lawyers’ Duty to do Justice: A New Look at the History of the 1908 Canons*, 24 LAW & SOC. INQUIRY 1, 3-5 (1999) (“[N]o issue in legal ethics has been debated more often, and resolved less satisfactorily.”).

from its rhetorical use is the task which we are about to undertake.<sup>18</sup>

B. *"Officer of the Court" and the Duty to Seek Justice*  
*Argument*

Attempting to resolve the purported conflict in the lawyer's role, commentators argue that lawyers owe a substantive duty to the judicial system and the public to seek justice because they are "officers of the court." This duty is separate from, and sometimes inconsistent with, the duties a lawyer owes to her clients.<sup>19</sup> This so-called "role-differentiation thesis"<sup>20</sup> posits a separation between personal morality and the conduct required of the lawyer thus permitting the erroneous claim that lawyers are not morally accountable for their client's goals. Moral non-accountability is seen as the "central harm" of the standard conception of lawyering. To solve this problem requires a substantive duty to do justice obligation.<sup>21</sup> "Moral activism" is the phrase that has captured the notion that lawyers have a substantive duty to seek justice even when it is at odds with the client's lawful instructions. According to proponents, moral activism is needed because the

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18. See Gaetke, *supra* note 6, at 42-43 (1989) (recognizing that "[t]he current meaning of officer of the court is as elusive as its origins" and that the phrase has been used so imprecisely and broadly that "one fails to act as an officer of the court whenever he acts inappropriately as a lawyer").

19. See Serena Stier, *Legal Ethics: The Integrity Thesis*, 52 OHIO ST. L. J. 551, 555-56 (1991) (critiquing proponents and moral activists William H. Simon and David Luban among others). Richard Wasserstrom's article in 1975 has been instrumental in this discussion. See Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUMAN RIGHTS 1, 3 (1975) (making the observation that professionals (lawyers included) engage in varying degrees in behavior which requires "put[ing] to one side considerations of various sorts—and especially various moral considerations—that would otherwise be relevant if not decisive," Wasserstrom concludes that because "the lawyer has a duty to make his or her expertise fully available in the realization of the end sought by the client . . . the lawyer is, in essence, an amoral technician." *Id.* at 4. This argument at once acknowledges the centrality of the lawyer's agency role and yet fails to fully appreciate the role's proper limitations in an adversary system. Even Wasserstrom concedes a critical danger: "[S]ubstitut[ing the lawyer's] own private views of what ought to be legally permissible and impermissible for those of the legislature . . . would constitute a surreptitious and undesirable shift from a democracy to an oligarchy of lawyers." *Id.* at 11.

20. The term "role-differentiated behavior" comes from Wasserstrom, *supra* note 19, at 3.

21. See *id.* at 564.

traditional or standard conception of lawyer role makes it impossible to be both a good person and a good lawyer.<sup>22</sup> The crux of the argument is that the lawyer's most important role is as an "officer of the court" and, therefore, the substantive duty to seek justice is paramount. Professors William H. Simon<sup>23</sup> and David Luban<sup>24</sup> are among the most prominent and prolific writers on this subject.<sup>25</sup> Professor Simon grounds his proposal for "ethical

22. See *infra* note 102 and accompanying text.

23. See William H. Simon, *The Legal and the Ethical in Legal Ethics: A Brief Rejoinder to Comments on the Practice of Justice*, 51 STAN. L. REV. 991 (1999); William H. Simon, "Thinking Like a Lawyer" About Ethical Questions, 27 HOFSTRA L. REV. 1 (1998); William H. Simon, *From the Trenches and Towers, The Kaye Scholer Affair: The Lawyer's Duty of Candor and the Bar's Temptation's of Evasion and Apology*, 23 L. & SOC. INQUIRY 243 (1998); William H. Simon, *Essay Ethics, Professionalism, and Meaningful Work*, 26 HOFSTRA L. REV. 445 (1997); William H. Simon, *Should Lawyers Obey the Law?*, 38 WM. & MARY L. REV. 217 (1996); William H. Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703 (1993); William H. Simon, *Reply: Further Reflections on Libertarian Criminal Defense*, 91 MICH. L. REV. 1767 (1993); William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones's Case*, 50 MD. L. REV. 213 (1991). See generally WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE* (1999).

24. See David Luban, *Lawyers and Justice: An Ethical Study* (1988) (arguing clients goals can be trumped by lawyers moral views); David Luban, *Contrived Ignorance*, 87 GEO. L.J. 957 (1999); David Luban, *Reason And Passion in Legal Ethics*, 51 STAN. L. REV. 873 (1999); David Luban, *Rediscovering Fuller's Legal Ethics*, 11 GEO. J. LEGAL ETHICS 801 (1998); David Luban, *The Bad Man and the Good Lawyer: A Centennial Essay on Holmes's The Path of the Law*, 72 N.Y.U. L. REV. 1547, 1552 (1997) [hereinafter Luban, *The Bad Man*]; David Luban, *Legal Ideals and Moral Obligations: A Comment on Simon*, 38 WM. & MARY L. REV. 255 (1996); David Luban, *The Social Responsibilities of Lawyers: A Green Perspective*, 63 GEO. WASH. L. REV. 955 (1995); David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729 (1993); David J. Luban, *Legal Traditionalism*, 43 STAN. L. REV. 1035 (1991); David Luban, *Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann*, 90 COLUM. L. REV. 1004 (1990) [hereinafter Luban, *Partisanship*]; David J. Luban, *Essay Freedom and Constraint in Legal Ethics: Some Mid-Course Corrections to Lawyers and Justice*, 49 MD. L. REV. 424 (1990); David Luban, *The Noblesse Oblige Tradition in the Practice of Law*, 41 VAND. L. REV. 717 (1988) [hereinafter Luban, *The Noblesse Oblige Tradition*].

25. Other prominent scholars advocating a substantive "officer of the court" role include Professors Robert W. Gordon and Harry I. Subin. See Robert W. Gordon, *Corporate Law as a Public Calling*, 49 MD. L. REV. 255, 258 (1990) (stating that even if at odds with client wishes, the lawyer should implement own vision of public interest); Robert W. Gordon, *Ethical Worlds*, *supra* note 15, at 728 (claiming that lawyers understood the "zealous advocacy norm" and duties as "officers of the courts" were "general obligations in permanent tension, which must be balanced against one another"; but now advocacy is the "master norm"); ROBERT W. GORDON, *LAWYERS AS THE AMERICAN ARISTOCRACY* (1998);

discretion" on the lawyer's role as an "officer of the court."<sup>26</sup> Professor Luban's "ordinary morality" proposal is justified by the attorney's role as "minister of justice."<sup>27</sup>

But what if lawyers do not owe duties to the court or the public that are inconsistent with duties owed to clients nor greater than duties owed by non-lawyers to the legal system?<sup>28</sup> If the duties to the court and the public are

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Gordon, *Independence*, *supra* note 7, at 13; (acknowledging that when lawyers talk about being officers of the court it is usually "anything but real." He then urges suspending disbelief and applying "republican tradition" to give content to the concept officer of the court); Harry I. Subin, *The Criminal Lawyer's Different Mission: Reflections of the "Right" to Present a False Case*, 1 GEO J. LEGAL ETHICS 125 (1987) (outlining the appropriate boundaries that may be used by attorneys when their clients' goals conflict with the truth); Harry I. Subin, *Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 IOWA L. REV. 1091 (1985) (arguing that disclosure of client confidences is justified, in part, because of lawyer's role as officer of the court). For more discussion of moral activism, see, for example, Paul R. Tremblay, *Practiced Moral Activism*, 8 ST. THOMAS L. REV. 9 (1995), discussing Simon and Luban, and Carle, *supra* note 17, at 3-5, discussing Simon and Luban, the moral activist view and the nonaccountability view.

26. William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1091 (1988) [hereinafter Simon, *Ethical Discretion*] ("The discretionary approach . . . assumes a public dimension to the lawyer's role . . . that dimension is grounded in the lawyer's age-old claim to be an 'officer of the court' . . . . Lawyers are entitled to use ethical discretion even when against client goals.); *see also id.* at 1133. In basing his model, in part, on the concept "officer of the court," Simon both acknowledges and capitalizes on the lack of "a consensus about where to draw the line between these two aspects of the lawyer's role [the advocate and an 'officer of the court' with responsibilities to third parties, the public, and the law], and the two have always been in tension within the professional culture." *Id.*

27. Luban, *The Bad Man*, *supra* note 24, at 1551-52 (connecting "minister of justice" with the lawyer's role as an "officer of the court" and observing that he, Simon, and Gordon have advanced this as a justification for the lawyer's duty to seek justice); *see also* Luban, *The Noblesse Oblige Tradition*, *supra* note 24, at 737-39.

28. There are scholars who both acknowledge the attorney's agency role and recognize that the characterization officer of the court has little or no substantive content. *See* Geoffrey C. Hazard, Jr. *The Client Fraud Problem as a Justinian Quartet: An Extended Analysis*, 25 HOFSTRA L. REV. 1041, 1049 (1997). An advocate's function is to be an intermediary between the client and the court, "carefully controlling what the court will learn about what the client knows. Statements cast in terms of "complete loyalty" [to the client] and "complete candor" [to the court] must be regarded as hortatory, hypocrisy, or simply nonsense." *Id.*; *see also* Deborah Rhode, *Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665 (1994) (stating that lawyers obligations as officers of the court are "quite limited and largely track the prohibitions on criminal and fraudulent conduct that govern all participants in the legal process"). Professor Rhode, however, urges that the characterization be made more meaningful.

merely rhetorical, the role certainly can not bear the weight of these moral activist schemes no matter how well intentioned or appealing such a role may be to some. Moreover, if lawyers are agents,<sup>29</sup> such proposals may be so fundamentally incompatible with agency law that acceptance would require reconsideration of the current basic understanding of the attorney's role within the adversary system.

### C. *The Label of "Officer of the Court"*

There are substantive and process dimensions to the attorney's role as an "officer of the court." The substantive aspect of the role, however, is limited to a gate-keeping or screening function.<sup>30</sup> As for process, attorneys ensure that

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29. A brief introduction to key agency concepts is necessary. The agency relation enables one (the agent) to act or speak on behalf of another (the principal) and commit them, either allowing the individual to be in more than one place at the same time, or to benefit from one with greater knowledge and skill. The duty of obedience distinguishes the agent from all others with fiduciary responsibilities. The agent's task is not to determine the best interest of the principal and then act to achieve it. Rather the agent's duty is to obey the principal's lawful instructions. That duty, however, is not absolute. No agent is permitted to engage in conduct that is illegal. For agents like attorneys who are nonemployee agents or independent contractors, the principal exercises control over goals and objectives, but not the means to accomplish them. *See infra* Part II.

30. Attorneys perform a screening function by preventing the filing of claims that are meritless. *See Nesbitt v. Hopkins*, 907 F. Supp. 1317, 1321 n.4 (D. Neb. 1995).

As an officer of the court, counsel . . . properly acts as "screen" or "filter" of the client's cause, a duty involving both distillation and exclusion. Distillation requires the lawyer to refine underlying facts and argument into a cogent claim for relief, thereby preserving scarce judicial resources otherwise spent navigating through a morass of allegations and legal citation. *Exclusion, on the other hand, requires the lawyer to decline a client's invitation to present to the court claims not well-grounded in fact and law, as well as refuse to engage in conduct which, although furthering the ends of the client is inconsistent with the lawyer's professional duty to the court.* Sometimes, this may involve counseling the client that he is a "damned fool[]" and should stop." This exclusionary duty is encapsulated in Rule 11's insistence that signed pleadings certify a lawyer's knowledge and belief, "formed after an inquiry reasonable under the circumstances," that the client's claims are arguably grounded in law and likely to have evidentiary support. Ignoring these twin duties renders the lawyer little more than a "hired gun . . . [who], once engaged, does his client's bidding, lawful or not, ethical or not."

*Id.* (citations omitted) (emphasis altered from original). This standard concedes

the court can perform its function in the adversary system by discovering the facts and the law and then presenting them so that disputes can be efficiently, and some think optimally, resolved.<sup>31</sup> This procedural duty to the court is identical to part of the obligation the lawyer owes the client. Duty to the client requires following the client's lawful instructions faithfully.<sup>32</sup> Correspondingly, this part of the lawyer's duty to the court requires presentation of the client's matter so that it may be resolved in accordance with the law. To this point, these aspects of the attorney's role are not in conflict.

Much of the confusion surrounding the label "officer of the court" is caused by the phrase itself. The word "officer" conjures up images of police, law enforcement, and government. When "officer" and "court" are connected, the phrase insinuates a formal and continuing special relationship with access and responsibilities to authority not possessed by, or due by, others.<sup>33</sup> Since the club is exclusive—only lawyers can participate—exceptional importance and status is implied.<sup>34</sup> According to one commentator:

The very words "officer of the court" connote a mandatory public interest role for lawyers and suggest that lawyers sometimes must act in a quasi-judicial or quasi-official capacity despite duties owed to their clients.<sup>35</sup> The primary distinguishing characteristic of the

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a low gate consistent with the lawyer's role as agent providing access to the legal system. The language for which emphasis has been added is typical of references to "duty to the court" but says no more than if the clients ends are not in accordance with law the lawyer is prohibited from assisting. The rule is the same for agents. *See infra* Part II.

31. *See* Stephan A. Landsman, *A Brief Description of the Development of the Adversary System*, 44 OHIO ST. L.J. 713 (1983) (collecting and discussing commentators critical of the adversary system). *But see* 2 JOHN HENRY WIGMORE, *A TREATISE ON THE LAW OF EVIDENCE* 1697 (1904) (stating that cross-examination is the greatest engine for discovering the truth ever invented).

32. *See infra* notes 270-91 and accompanying text.

33. *See* Gaetke, *supra* note 6, at 43 (stating that the words "officer of the court" "inherently suggest . . . that lawyers owe a special duty to the judicial system or, perhaps, to the public that other participants in the legal process do not owe").

34. *See id.* at 43 n.21 (quoting *In re Integration of Neb. State Bar Ass'n*, 275 N.W. 265, 268 (Neb. 1937)) ("At least implicitly, this special duty elevates the interests of the judicial system or of the general public above those of the client or lawyer.").

35. *Id.* at 48 n.50. Ironically, the label itself suggests "an agency relationship between the court as principal and the lawyer as agent. A lawyer's

duties making up the officer of the court obligation, therefore, must be their subordination of the interests of the client and the lawyer to those of the judicial system and the public.<sup>36</sup>

In words and concept, the characterization "officer of the court" intimates a role for attorneys superior to that of non-lawyers, suggesting that the lawyer owes her first fidelity to the court.

[T]he officer of the court model contemplates that clients hire something other than a zealous advocate when they enlist the services of a lawyer. Rather, they hire a legal representative whose obligations to the judicial system at times supercede the undivided fidelity and enthusiasm an agent owes to his principal.<sup>37</sup>

In fact, the notion that the attorney has a meaningful and distinct role as an "officer of the court" is largely an illusion caused by self-love and self-promotion.<sup>38</sup> "Careful analysis of the role of the lawyer within the adversarial legal system reveals the characterization to be vacuous and unduly self-laudatory. It confuses lawyers and misleads the public."<sup>39</sup> The perpetuation of the lawyer role as an "officer of the court" by the profession is tantamount to a charade.<sup>40</sup>

Conflict between the duties of loyalty and zealous advocacy and the duty to seek justice exists only if the latter is inconsistent with the former and greater than the general obligations to the legal system all must bear.<sup>41</sup> In

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obligation to act as an officer of the court implies that in those instances his primary allegiance is to the court rather than to the lawyer's other principal, the client." *Id.* (citing *Langen v. Borkowski et. al.*, 206 N.W. 181, 190 (Wis. 1925)).

36. *Id.* at 48.

37. *Id.* at 43-44.

38. *See id.* at 44-45. (observing that the label has "virtuous overtones" which directly benefit attorneys by distinguishing them from other professional agents and by emphasizing the important public function lawyers have); *see also* CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 2-3 (1986) (referring to the tendency of lawyers to engage in such self-flattery as "the hero mythology" of the legal profession); Gordon, *Independence*, *supra* note 7, at 2.

39. Gaetke, *supra* note 6, at 39.

40. *See id.* at 45. ("[I]f the characterization bears little relationship to the actual obligations of lawyers, its repeated declaration by the courts, the organized bar, and individual lawyers is sheer professional puffery or, worse, deliberate deceit.")

41. *See id.* at 49 ("An ethical requirement is part of the lawyer's obligation as an officer of the court only if it compels conduct by a lawyer that subordinates the interest of the client and the lawyer to those of the judicial



order to qualify as an "officer of the court" duty, a duty must be inconsistent with, or superior to, an obligation owed to the client and not a general responsibility to the judicial system or the public shared by all. As we shall see, the lawyer's obligations to anyone or any ideal other than her client are nearly identical with the responsibilities of all citizens.<sup>42</sup>

1. "*Officer of the Court*"—*Pre-revolution*. Before turning to modern usage it will be informative to look backward, first to medieval England and then quickly to the Roman Empire, ancient Greece, and finally back to America.

a. *Medieval England*.<sup>43</sup> From at least the 13th Century, when the courts began to regulate the admission of lawyers and their conduct,<sup>44</sup> lawyers have been considered "officers of the court."<sup>45</sup> Lawyers may also have been considered "officers of the court" because they were frequently

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system or the public, and also is not coextensive with an obligation imposed on laymen participating in the legal process.").

42. See generally Joseph M. Perillo, *The Law of Lawyers' Contracts is Different*, 67 FORDHAM L. REV. 443 (1998) (discussing differences between treatment of lawyers and others in contract law); Nathan M. Crystal, *The Lawyer's Duty to Disclose Material Facts in Contract or Settlement Negotiations*, 87 KY. L.J. 1055, 1083 (1999).

43. For a thoroughly researched article on the legal profession in medieval England see Jonathan Rose, *The Legal Profession in Medieval England: A History of Regulation*, 48 SYRACUSE L. REV. 1 (1998); see also PAUL BRAND, *THE ORIGINS OF THE ENGLISH LEGAL PROFESSION* (1992) (detailing and analyzing Anglo-Norman England through Edward I).

44. See EDMUND B.V. CHRISTIAN, *A SHORT HISTORY OF SOLICITORS* 13 (1896); Rose, *supra* note 43, at 49; *People ex rel Karlin v. Culkin*, 162 N.E. 487, 490-91 (N.Y. 1928); 1 ROT. PARL. 84, no. 22, 20 Edw. 1 (1292) (The Ordinance of 1292).

45. See Rose, *supra* note 43, at 79; see also ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 44 (1953) (recounting how the agent for litigation became subject to control by the courts and began to be regarded as an officer of the courts). The current distinction between the roles of solicitor and barrister began under different names in the middle ages. See *infra* notes 49, 213-16 and accompanying text; ROBERT ROBSON, *THE ATTORNEY IN EIGHTEENTH-CENTURY ENGLAND* 2 (1959). Barristers were not subjected to the same kind of control by courts as attorneys because they "did not stand in [the] client's place, but only used his skilled voice on his behalf." *Id.* Unlike the attorney, the barrister's role mostly played out in court in the presence of the client, the client's attorney or both, and the judge, and outside of court the barrister typically functioned in the presence of or under the supervision of the attorney. Therefore, the need for intense supervision by the courts was considerably reduced. See *id.*

employed as clerks of the courts<sup>46</sup> and were allowed to represent clients.<sup>47</sup> For the lawyers who were clerks of the court, the label "officer of the court" was literally true.

Being an "officer of the court," however, imposed no duties on lawyers that were inconsistent with the duties owed to clients.<sup>48</sup> As "officers of the court," lawyers<sup>49</sup> were prohibited from engaging in illegal conduct, and subject to sanction-fine, disbarment, or jail if they violated these prohibitions. There was not a code of professional responsibility or separate regulatory or disciplinary authorities in medieval England.<sup>50</sup> Moreover, neither tort nor contract remedies had yet been commonly applied to lawyers.<sup>51</sup> As a result, discipline was imposed by judges pursuant to statute, ordinance, and, to a lesser extent, inherent judicial power.<sup>52</sup>

The Statute of Westminster the First in 1275 was directed at allegations of lawyer misconduct that included extortion and bribery;<sup>53</sup> it also prohibited deceit, collusion or

46. See ROBSON, *supra* note 45, at 104; see also GEO. W. WARVILLE, *ESSAYS IN LEGAL ETHICS* 29-31 (2d ed. 1920) (claiming the term relates directly to the fact of licensure by the Crown); Committee on Prof. Ethics v. Humphrey, 377 N.W.2d 643, 648 (Iowa 1985) (Reynoldson, C.J., concurring) (same).

47. ROBSON, *supra* note 45, at 108 (stating that "the fees of the clerk of the peace were limited by an act of 1755, but the office continued to be much sought after, for apart from the fees and the salary, the position brought in much profitable legal business of which the clerk had the first picking"); see also Rose, *supra* note 43, at 11; BRAND, *supra* note 43, at 51.

48. As was the case in the Roman Empire and ancient Greece, in early medieval England those assisting others in legal proceedings were friends or relatives. See CHRISTIAN, *supra* note 44, at 9; BRAND, *supra* note 43, at 10, 46, 69.

49. In England, individuals performing an advocacy and/or representative role in legal proceedings were known by different names at different times. While on occasion some individuals may have served in both capacities, lawyer role in medieval England was (and still is to a large extent) divided between a true agent, i.e., an attorney who could speak and act for the client in the client's absence (now usually known as "solicitor") and one who spoke for and represented the client but only in the client's (or client's solicitor's) presence. This individual, now known as barrister, has also been known as "pleader," "narratores," "counteurs," "serjeants-counteurs," or "serjeants." There is some evidence that pleaders were also treated as officers of the court. See POUND, *supra* note 45, at 77; Rose, *supra* note 43, at 79.

50. See Rose, *supra* note 43, at 79.

51. See *id.*; see also David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 807 (1992).

52. See Wilkins, *supra* note 51, at 87.

53. See Rose, *supra* note 43, at 53 ("[T]his first regulation of lawyers . . . dealt with champerty, extortion, bribery, abuse of official power, maintenance,

malfeasance in the King's Court.<sup>54</sup> At the time, one of the most common defenses to claims was to allege any false or frivolous charge.<sup>55</sup> By the terms of a 1403 statute, any attorney who fabricated evidence or encouraged someone to bring a frivolous suit was suspended from the court for a year.<sup>56</sup> The Court of Common Pleas in 1564 issued an order indicating that the penalty for lack of due diligence, excessive error, and absence from court<sup>57</sup> would be expulsion from the Attorney's Roll of the Court and possible fines.<sup>58</sup> The King's Bench Court threatened to suspend a lawyer for being absent unless he had a valid excuse.<sup>59</sup> Both courts prohibited lawyers from practicing under an alias or allowing others to practice under the lawyer's name, violations which carried a penalty of expulsion.<sup>60</sup>

In 1567, a special jury made up of "officers, clerks, and

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and abusive litigation practices by royal and court officials, lawyers, and individual litigants.").

54. See *id.* at 49-50; see also CHRISTIAN, *supra* note 44, at 13-14. The Statute of Westminster the First imposed penalties "on any serjeant, pleader or other who was guilty of any manner of deceit or collusion in the King's Court, or consented unto it in deceit of the court or to beguile the court or the party; and champerty and maintenance were forbidden." BRAND, *supra* note 43, at 124. An instance of deceit in the context of duty to the court is described by Brand. A serjeant having learned that prior client representations were false refused to repeat these statements and deserted his clients in the middle of the case. The court found this withdrawal to be entirely appropriate. See *id.*

55. See CHRISTIAN, *supra* note 44, at 17-18.

The fact that so much of the prevalent injustice was committed under or indeed by means of forms of law, is connected with another character of the age, namely, its extreme litigiousness. Legal chicane was one of the most regular weapons of offence and defence, and to trump up charges, however frivolous, against an adversary, one of the most effectual means of parrying inconvenient charges against oneself. The prevalence of false indictments and malicious suits is a frequent subject of complaint in Parliament. Forgery of documents seems to have been common, and when statutes were passed against this practice, advantage was taken of these statutes to throw suspicion on genuine title deeds.

*Id.*

56. See Henry IV, ch. 18 (1402) (Eng.).

57. Because the medieval courts were infrequently in session in a particular locale, absence created serious problems. See BRAND, *supra* note 43, at 5.

58. See CHRISTIAN, *supra* note 44, at 38-39.

59. See *id.* at 42-43 (stating that in 1582 "[t]he rule against absence from the court were made more stringent. Any attorney absent for two terms, except for sickness or like cause, was to be forejudged and no longer attorney. That, indeed, was the almost universal penalty for professional misdoings").

60. See *id.*

attorneys" was convened to inquire into "falsities, erasures, contempts and misprisions" committed by attorneys.<sup>61</sup> "[F]alsity" was defined as

where a man outwardly will set a shew, a face and countenance that he doth well, and truly knowing inwardly and to himself that it is not so, but mere subtlety and falsehood, as, for example, if he will sue forth of purpose false process, or wittingly of himself will minister a false and foreign plea, not taking it of his client.<sup>62</sup>

An "erasure" was simply a wrongful alteration of the record and a contempt was committed by "officers, clerks, [others], and attorneys" who do not obey court orders.<sup>63</sup> Knowledge that a felony was committed and failure to report it was (and is)<sup>64</sup> considered misprision.<sup>65</sup> Lawyers who were dilatory with their client's matters were also investigated.<sup>66</sup> Aside from neglecting client matters, the other subjects of the investigation of 1567 amounted to criminal conduct, conduct in which lawyers and non-lawyers alike were prohibited from engaging. In medieval England, the notion of a substantive duty to do justice aspect to the lawyer's "officer of the court" role that was inconsistent with client loyalty and greater than the obligations of non-lawyers did not exist.

b. *Roman Empire*. Whether advocates or jurisconsults<sup>67</sup> owed obligations to the courts or society that were both greater than, or different from, duties owed by all in the Roman Empire, and potentially incompatible with the duties owed to clients is unclear.<sup>68</sup> But there is no clear

61. See *Ex rel Karlin v. Culkin*, 162 N.E. 487, 490-91 (N.Y. 1928).

62. *Id.*

63. *Id.*

64. See, e.g., 18 U.S.C. § 4 (1995) (misprision of felony).

65. See *Karlin*, 162 N.E. at 491 ("A misprision is where a man knoweth treason or felony to be done, and yet doth conceal it and keep it close.") (citing Easter Term, 9 Eliz. (1567)).

66. See *id.* ("Of these and like negligences' the jury shall inquire; and also of such attorneys' as be late and slack comers to the term by reason whereof their clients' matters not go forward.' 'We shall deprive such of their attorneyship.' The end of the inquisition was, not punishment, but discipline."), quoted in Easter Term, 9 Eliz. (1587).

67. See Anton-Herman Chroust, *The Legal Profession in Ancient Republican Rome*, 30 NOTRE DAME L. REV. 97, 144-45 (1954-55) [hereinafter Chroust, *The Legal Profession*] (jurisconsults were Roman lawyers).

68. Certain similarities between the systems exist, although the historical

evidence of such a duty. Early in the Roman Empire the person performing in the lawyer role was usually a relative or friend.<sup>69</sup> Given the close personal nature of the relationship, imposition of a special duty to do justice obligation inconsistent with the feelings of loyalty a person so close to the client would naturally possess, seems unlikely and quite unrealistic. The same is true for the head of a clan (*patronus* or *patron*),<sup>70</sup> who was obligated by Roman ideals of "chivalry" to protect his clients<sup>71</sup> by representing them in court and explaining the law to them.<sup>72</sup> "Thus this duty of the patron towards his client was the basis both of the advocate's function and of the *jurisconsult's* function as they developed in Rome."<sup>73</sup> In addition to providing legal advice and assistance to private clients and preparing legal documents, the *jurisconsult* advised judicial magistrates.<sup>74</sup> In this latter role, the magistrate appears to have been simply another client.

c. *Ancient Greece*. Here again the historical record is not entirely clear, but there is no evidence suggesting that

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record not entirely clear and comparison with our present day adversary system is imperfect.

69. See POUND, *supra* note 45, at 45; see also Chroust, *The Legal Profession*, *supra* note 67, at 136.

70. See Chroust, *The Legal Profession*, *supra* note 67, at 106 ("[P]atronus referred to a powerful patrician who assumed a protective attitude toward certain people, namely, 'clients,' who had put themselves under the protection of his clan.").

71. See POUND, *supra* note 45, at 44 ("When he appeared in court to argue he was called a *patronus causarum* or simply *patronus*, and the person he represented was called a client. These terms take us back to the origin of Roman advocacy in the relation of the head of a patrician household to his dependents in the polity of the old city.").

72. See *id.* at 45 ("[Clients] were entitled to be protected by the patron. In particular, the patron was bound to appear in court for his clients, originally as representing the kin group of which they were taken to be members and explain the law to them, since knowledge of the old customary law of the city was a monopoly of the heads of the patrician households."); see also Chroust, *The Legal Profession*, *supra* note 67, at 136 (stating that advocacy made its first appearance in early Rome as "chivalrous help and assistance . . . afforded by the patron . . . [on] behalf of a friend, neighbor or suppliant").

73. POUND, *supra* note 45, at 45.

74. See Anton-Herman Chroust, *The Emergence of Professional Standards and the Rise of the Legal Profession: The Graeco-Roman Period*, 36 BOSTON U. L. REV. 587, 593 (1956) (discussing that the early Roman *jurisconsult* gave legal advice and legal assistance to private parties and instructed magistrates) [hereinafter Chroust, *Emergence*].

advocates in ancient Greece owed duties to legal tribunals that were greater or different than any other member of the polity. First, the person filling the role of assistant was usually a relative or friend.<sup>75</sup> The nature of this relationship suggests that it would be unrealistic to impose a special duty to the court not shared by all members of the community. Second, the advocate either appeared with the party or never appeared before the tribunal. This adjunct status also suggests the absence of duties owed to the tribunal beyond those owed by all.

2. "*Officer of the Court*" in America. In the American legal system, lawyers have never owed duties to justice inconsistent with responsibilities to clients or greater than the obligations of non-lawyers. The perspective offered by a historical examination of the subject is particularly enlightening<sup>76</sup> because rhetoric nourished by self-importance and self-interest has played such a large part in defining this ephemeral concept.

a. *David Hoffman*. David Hoffman published the first legal ethics treatise in America in 1817.<sup>77</sup> His 1836 edition of "Course of Legal Study" included an expanded code of ethics entitled "Fifty Resolutions in Regard to Professional Deportment."<sup>78</sup> These resolutions are "most notable for their refusal to separate private morality from public morality, or to admit that practitioners might ever be guided by norms that did not equally apply to all other citizens."<sup>79</sup> Hoffman's view of legal ethics had a decidedly religious focus<sup>80</sup>

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75. See POUND, *supra* note 45, at 31-32; see also WILLIAM FORSYTH, *THE HISTORY OF THE LAWYER* 21 (1875).

76. See Hoeflich, *supra* note 14, at 816 ("[K]nowing the history of views on the lawyer-client relationship and the obligations of representation can help us in assessing our current situation.").

77. See *id.* at 795. See generally Maxwell Bloomfield, *David Hoffman and the Shaping of a Republican Legal Culture*, 38 Md. L. Rev. 673 (1979) (providing a historical and biographical review of Hoffman).

78. DAVID HOFFMAN, *A COURSE OF LEGAL STUDY: ADDRESSED TO STUDENTS AND THE PROFESSION GENERALLY* 752 (William S. Hein & Co. 1968) (1836).

79. Bloomfield, *supra* note 77, at 684.

80. See HOFFMAN, *supra* note 78, at 55. Professor Carle refers to his approach as "religious jurisprudence." Carle, *supra* note 17, at 10-11. Dean Hoeflich finds implicit in Hoffman's resolutions that the lawyer must "exercise their own moral judgment" in representing a client. Hoeflich, *supra* note 14, at 797-98.

requiring the lawyer to seek justice and avoid doing injustice even when it required disobeying the client's lawful instructions. Thus, Hoffman's conception of the lawyer's role subordinated client loyalty to the goal of justice.<sup>81</sup> For example, he urged that lawyers refuse to plead the Statute of Limitations so as to avoid becoming a partner in the client's "knavery."<sup>82</sup> In form if not in content, Hoffman's emphasis on the importance of the lawyer's conscience as a guide for professional conduct<sup>83</sup> is quite similar to the position of many modern commentators.<sup>84</sup> It is also the dissenting, non-controlling view as measured by the current rules of professional responsibility.<sup>85</sup>

b. *George Sharswood*. The writer who had the most important and widespread impact on professional ethics and role is George Sharswood.<sup>86</sup> He is said to be the father of legal ethics,<sup>87</sup> although only recently has modern ethics scholarship begun to examine his work.<sup>88</sup> Sharswood's "An

81. See Bloomfield, *supra* note 77, at 684.

82. HOFFMAN, *supra* note 78, at 754.

83. See Bloomfield, *supra* note 77, at 684.

84. See *supra* notes 19-25 and accompanying text.

85. See Carle, *supra* note 17, at 4 (stating that nonaccountability is the prevailing view of the modern American private bar and is reflected in the Modern Rules of Professional Conduct).

86. George Sharswood was born in 1810, was graduated from the Classical Department of the University of Pennsylvania and began the study of law under the preceptorship of a distinguished advocate of the bar. He was elected to the state legislature three times and became a judge in 1845 at the age of 35, fourteen years after being admitted to the bar. Having served as a trial judge for 22 years, Sharswood was elected to the Supreme Court of Pennsylvania in 1867, where he became Chief Justice in 1879 and from which he retired in 1883. In 1850 Sharswood became a Professor of Law at the Law Department of the University of Pennsylvania and continued an association until after his election to the Supreme Court. See SHARSWOOD, *infra* note 90, memorial.

87. Professor Russell G. Pearce's important rediscovery of George Sharswood has had considerable influence on the content of the contemporary ethics dialogue. See Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 GEO J. LEGAL ETHICS 241 (1992).

88. See *id.* Since Professor Pearce's article many scholars have written about the history of legal ethics in America. See, e.g., Carle, *supra* note 17; Hoeflich, *supra* note 14, at 816; Geoffrey C. Hazard, Jr., *The Legal Profession: The Impact of Law and Legal Theory*, 67 FORDHAM L. REV. 239 (1998); Alliston Marston, *Guiding the Profession: The 1887 Code of Ethics of the Alabama State Bar Association*, 49 ALA. L. REV. 471 (1998); Alva Hugh Maddox, *Lawyers: The Aristocracy of Democracy or "Skunks, Snakes, and Sharks"?*, 29 CUMB L. REV. 323 (1998-99); James E. Moliterno, *Lawyer Creeds and Moral Seismography*, 32 WAKE FOREST L. REV. 781 (1997).

Essay in Professional Ethics"<sup>89</sup> first delivered in 1854<sup>90</sup> is

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89. The first edition of his Essay was originally published as "Compend of Lectures on the Aims and Duties of the Profession of the Law." SHARSWOOD, *infra* note 90, memorial. It went through four editions in Sharswood's lifetime, the latest in 1876. *See id.* The Essay is divided into two parts, the first addresses the lawyer's duties to the public or state, and the second discusses the lawyer's duties to the court, other lawyers, and the client. The Essay is 182 pages in length. The first 54 pages are devoted to part I in which he discusses at length the importance of property rights. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 2.6.2 n.20 (describing this discussion as a "diatribe" and an example of a writer having an "agenda").

90. Excerpts from Part I of the Essay are included to inform our understanding of Sharswood and the time in which he wrote. *See* GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 9 (1993) (noting that "[t]he dignity and importance of the Profession of the Law, in a public point of view, can hardly be over-estimated").

There is, perhaps, no profession, after that of the sacred ministry, in which a high-toned morality is more imperatively necessary than that of the law. There is certainly, without any exception, no profession in which so many temptations beset the path to swerve from the line of strict integrity; in which so many delicate and difficult questions of duty are continually arising. There are pitfalls and mantraps at every step, and the mere youth, at the very outset of his career, needs often the prudence and self-denial, as well as the moral courage, which belong commonly to riper years.

*Id.* at 55; *see id.* at 10 (reflecting on the subject of legislation: "It is the noblest work in which the intellectual powers of man can be engaged, as it resembles most nearly the work of the Deity"); *id.* (commenting on the role of government: "What government owes to society, and all it owes, is the impartial administration of equal and just laws. This produces security of life, liberty, and of property."); *id.* at 21 (revealing that Sharswood placed special emphasis on property, as did others of his time and other contemporary scholars. "Property has an especial claim to protection against the government itself").

Men have a right not only to be well governed, but to be cheaply governed—as cheaply as is consistent with the due maintenance of that security, for which society was formed and government instituted. This, the sole legitimate end and object of law, is never to be lost sight of—security to men in the free enjoyment and development of their capacities for happiness—SECURITY—nothing less—but nothing more. To compel men to contribute of the earnings or accumulations of industry, their own or inherited, to objects beyond this, not within the legitimate sphere of legislation, to appropriate the money in the public treasury to such objects, is a perversion and abuse of the powers of government, little if anything short of legalized robbery.

*Id.* at 21-22 (emphasis in original); *see id.* at 23 (reiterating that "[t]here is not much danger of erring upon the side of too little law. The world is notoriously too much governed"); *see also id.* at 25-26 (recognizing that lawyers played a central role in public life).

The American lawyer, considering the compass of his varied duties, and the probable call which will be made on him especially to enter the halls of legislation, must be a jurist. From the ranks of the Bar, more



the basis for the modern rules of professional responsibility.<sup>91</sup>

The significance of Sharswood's deep influence stems in part from the comprehensiveness of his presentation and, in part, from his eloquent articulation of the dominant view of attorney ethics. Sharswood's views are more practical than Hoffman's views which were then and remain at best aspirational.<sup>92</sup> Although Sharswood agreed with "many [of

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frequently than from any other profession, are men called to fill the highest public stations in the service of the country, at home and abroad.

*Id.*

Great as is the influence which the profession of the law can and does exercise upon the legislation of a country, the actual administration of law is entirely in their hands. To a large extent by private counsel, by the publication of works of research and learning, by arguments in courts of justice to assist those who are to determine what is the law, and to apply it to the facts, as well as in the actual exercise of judicature, this whole important province of government, which comes home so nearly to every man's fireside, is intrusted necessarily to lawyers.

*Id.* at 30-31.

Whether they seek them or are sought, lawyers, in point of fact, always have filled, in much the larger proportion over every other profession, the most important public posts. They will continue to do so, at least so long as the profession holds the high and well-merited place it now does in the public confidence.

*Id.* at 54.

91. The 1887 Alabama State Bar Code of Ethics, the 1908 American Bar Association's Canons of Ethics, the subsequent ABA Code of Professional Responsibility of 1969, the ABA Model Rules of Professional Responsibility of 1983, all reflect to a significant extent the contents of his Essay of 1854. As Professor Pearce has observed, subsequent ethics code writers relied quite heavily on Sharswood, in many instances using sections without any or significant alteration. *See* Pearce, *supra* note 87, at 241, 243-47 (discussing significance of Sharswood's essay in drafting of the ABA Canons and his continuing influence on the Model Code of Professional Responsibility and Model Rules of Professional Conduct).

92. As recent commentators have observed, there were others in this period who discussed legal ethics. *See generally* Carle, *supra* note 17. Dean Hoefflich discusses a variety of 19th century sources including: Simon Greenleaf's inaugural address upon becoming a chaired professor at the Harvard Law School, addresses of Bar leaders from Philadelphia, the Reverend Henry Boardman's eulogy of a Philadelphia Bar leader, Justice Story's eulogy of Chief Justice John Marshall, an anonymous memorial to a prominent South Carolina Bar leader, an obituary notice of a prominent Vermont attorney, and others. *See* Hoefflich, *supra* note 14. From reviewing these sources (and Hoffman and Sharswood), Hoefflich concludes that "[t]he normative rule in the nineteenth century was that a lawyer should choose honor over financial success." *Id.* at 817. Although interesting, reliance on some of these sources, in particular,

Hoffman's Fifty Resolutions] specific recommendations" he had fundamental differences with Hoffman about basic role definition.<sup>93</sup> Sharswood "severed the tie between public and private morality" preferring instead a role in which attorneys utilized the law and rules of litigation to provide clients with vigorous representation so that justice could be determined by judge or jury.<sup>94</sup>

While there were major differences between Sharswood's and Hoffman's views, the available evidence suggests that Sharswood's conception of the attorney's role was the mainstream view.<sup>95</sup> In addition to Professor Bloomfield's observation that Sharswood's description of the lawyer's role was the "standard work,"<sup>96</sup> early American and English history support a conception of attorney role as having a representative—not justice seeking—character.<sup>97</sup> Sharswood's occupation as judge, the essay's contents, the setting, audience,<sup>98</sup> and purpose of the presentation,<sup>99</sup> all

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eulogies and memorial addresses as "determining normative ethical values for lawyers" is difficult to accept at least without more authority on this genre than is offered. *Id.* at 809. More important, I disagree with Hoeflich's interpretation of most of these sources. Properly read they are consistent with the lawyer's responsibilities to procedural rights as agent and do not stand for the creation of substantive justice seeking duties to the court. Moreover, these sources often follow a familiar pattern: grand rhetoric followed by agency principles. See *supra* notes 6-18 and *infra* notes 163-66 and accompanying text.

93. See *infra* notes 100-06 and accompanying text.

94. *Id.*

95. As noted, Professor Pearce's 1992 article has triggered renewed interest in the history of legal ethics in America. Professors Pearce, Hoeflich, and Carle find republican themes in Sharswood's Essay, indeed, unlike Professor Pearce, Professor Carle finds Sharswood's and Hoffman's views essentially identical. See Carle, *supra* note 17, at 10 ("Their view . . . posited that lawyers could and should exert their sense of justice in individual cases to steer the legal system toward just results."). Professor Simon also finds in Hoffman's and Sharswood's writings some historical support for his theory of ethical discretion. See Simon, *Ethical Discretion*, *supra* note 26, at 1134. While I too see republican themes in Sharswood's Essay, I believe they are contradicted by other more consistent text. See *infra* notes 113-22 and accompanying text. Moreover, I attribute them to the rhetoric which has so dominated the "officer of the court" concept and to Sharswood's (and others during the 19th Century) "religious jurisprudence," i.e., their penchant for combining religious principles with legal principles. See Carle, *supra* note 17, at 10, and accompanying text.

96. See Bloomfield, *supra* note 77, at 687; Carle, *supra* note 17, at 11 ("It is doubtful that Hoffman's Resolutions had much influence on the practicing bar of his day.").

97. See *infra* notes 270-90 and accompanying text.

98. The audience consisted of University of Pennsylvania students studying law and lawyers.

support characterizing the Essay as the "standard work."<sup>100</sup> Examining the Essay should inform our understanding of lawyer role because it was relied on so heavily for the rules of professional responsibility from 1887 to the present day.<sup>101</sup> The Essay should be particularly instructive about the conflict in role definition between the attorney as advocate and attorney as an officer of the court: the extent to which attorneys are agents for clients or justice seekers who owe superior duties to the court.

i. "*Can a Good Lawyer be a Good Person?*" Recognizing the possibility of conflict among attorney obligations, Sharswood asked a variant of the question contemporary scholars claim is central to legal ethics:<sup>102</sup> "Can a good lawyer also be a good person?"<sup>103</sup> Sharswood claims that attorneys have affirmative obligations to justice and truth that are peculiar to their professional role. He asserts that lawyers should "use no falsehood," and "[t]ruth in all its

99. Its frequent instrumental advice lends further support. *See generally* SHARSWOOD *supra* note 90, Essay Part II.

100. Bloomfield, *supra* note 77, at 687.

101. *See* Pearce, *supra* note 87, at 243-47; *see also* Carle, *supra* note 17, at 9 (noting that Hoffman's Resolutions and Sharswood's Essay were distributed to the committee charged with drafting what became the ABA 1908 Canons).

102. *See* Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976); Stephen Gillers, *Can a Good Lawyer be a Bad Person?*, 84 MICH. L. REV. 1011 (1986); Landsman, *supra* note 31, at 713; THOMAS L. SHAFFER, ON BEING A CHRISTIAN AND A LAWYER 32 (1981); Harry T. Edwards, *A Lawyer's Duty to Serve the Public Good*, 65 N.Y.U. L. REV. 1148 (1990); Rob Atkinson, *Beyond the New Role Morality for Lawyers*, 51 MD. L. REV. 853, 855 (1992).

[T]he central question of legal ethics is usually posed as 'May a lawyer always do all that the law allows for every client?' This formulation reflects the orthodox answer, which has always been yes . . . . To do all that the letter of the law allows for clients, even if that causes considerable harm to innocent third parties, is not only permitted, but perhaps required, of lawyers. It is not just one way to be both a good person and a good lawyer; it is the only true way.

Atkinson, *supra*, at 855. It is noted later that whether one can be a good lawyer and a good person depends on the existence of an objective set of norms binding on individuals which Atkinson denies. *See id.* at 869-71. David B. Wilkins, *Do Clients have Ethical Obligations to Lawyers? Some Lessons from the Diversity Wars*, 11 GEO. J. LEGAL ETHICS 855 (1998). *See generally* Stier, *supra* note 19; Carle, *supra* note 17.

103. SHARSWOOD, *supra* note 90, at 81. Sharswood's formulation is: "But what are the limits of his duty when the legal demands or interests of his client conflict with his own sense of what is just and right? This is a problem by no means of easy solution."

simplicity—truth to the court, client, and adversary—should be indeed the polar star of the lawyer.”<sup>104</sup> “[N]o man can ever be a truly great lawyer, who is not in every sense of the word, a good man.”<sup>105</sup> Finally:

[From the start of the lawyer’s career,] let him cultivate, above all things, truth, simplicity and candor: they are the cardinal virtues of a lawyer. Let him always seek to have a clear understanding of his object: be sure it is honest and right, and then march directly to it. The covert, indirect, and insidious way of doing anything, is always the wrong way.<sup>106</sup>

The conclusion that Sharswood believed that the lawyer should pursue truth and justice even if that is in conflict with the client’s desires would seem inescapable;<sup>107</sup> however,

104. *Id.* at 167.

105. *Id.* at 168.

106. *Id.* at 169.

107. See Carle, *supra* note 17, at 13 n.23 (concluding that Sharswood “comes down unequivocally in favor of recognizing a duty to do justice on the part of individual lawyers in particular cases.”). This was not Sharswood’s view, however, except possibly in one small category of cases:

Counsel, however, may and even ought to refuse to act under instructions from a client to defeat what he believes to be an honest and just claim, *by insisting upon the slips of the opposite party, by sharp practice, or special pleading—in short, by any other means than a fair trial on the merits in open court.* There is no professional duty, no virtual engagement with the client, which compels an advocate to resort to such measures, to secure success in any cause, just or unjust; and when so instructed, if he believes it to be intended to gain an unrighteous object, he ought to throw up the cause, and retire from all connection with it, rather than thus be a participator in other men’s sins.

SHARSWOOD, *supra* note 90, at 98-99 (emphasis added). Even in this instance he does not urge withdrawal unless the client insists upon the use of wrongful means which lawyers as agents have the discretion to reject. Sharswood also identified another instance in which the lawyer might consider withdrawing:

It is not every case in which a man has a *legal* right that he has a *moral* right to claim the benefit of such laws. When a debtor, with ample means to pay, only wants to harass and worry his creditor, who has resorted to legal process and obtained a judgment, by keeping him out of his money, as it is often expressed, as long as he can; or where he wishes to take advantage of hard times to make more than legal interest, . . . these are cases which counsel ought to hold up in their proper light to those whom they advise, and wash their hands of the responsibility of them.

*Id.* at 113-14. As authority (so to speak) for this position, Sharswood refers to the sermon on the mount urging people to give others “all that is honestly theirs as far as you have the ability, whether the law affords them a remedy or not.”

it is not so.

In order to fully understand Sharswood's conception of the lawyer's role (and his answer to the good lawyer/good person question), one has to recognize its connection with the structure and function of government and the meaning of justice for Sharswood. It was important to have a system of rules and laws<sup>108</sup> designed generally to produce impartial and just results. Because universal agreement about justice is hard to come by in the concrete (as opposed to the abstract), affected as it is by our own self-interest and individual beliefs, In order for the law and rules to operate properly they can not be subject to individual notions of justice.<sup>109</sup> Impartial application of the laws was required for a properly functioning government.<sup>110</sup> The lawyer's role is to present the client's case diligently<sup>111</sup> so the judge or jury can resolve the dispute appropriately.<sup>112</sup> The lawyer is responsible for presenting the facts and the law and advocating the client's position "which the client in person, from want of learning, experience, and address, is unable to do in a proper manner."<sup>113</sup> The lawyer's duty does not include making ultimate decisions about the merits of a matter.<sup>114</sup> As agent, the lawyer is not morally responsible for the client's cause,<sup>115</sup> in part because the duty of zealous

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*Id.* at 114.

108. *See* SHARSWOOD, *supra* note 90, at 82.

Law, and justice according to law-this is the only secure principle upon which the controversies of men can be decided. It is better on the whole that a few particular cases of hardship and injustice, arising from defect of evidence or the unbending character of some strict rule of law, should be endured, than that general insecurity should pervade the community from the arbitrary discretion of the judge.

*Id.*

109. *See id.* ("No court or jury are invested with any arbitrary discretion to determine a cause according to their mere notions of justice. Such a discretion vested in any body of men would constitute the most appalling of despotisms.").

110. *See id.*

111. *See id.* at 78-80 ("Entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights, and the exertion of his utmost learning and ability, these are the higher points, which can only satisfy the truly conscientious practitioner.").

112. *See id.* at 84.

113. *Id.* at 83-84.

114. The attorney's gate keeping function has already been noted. *See supra* note 30 and accompanying text.

115. *See* SHARSWOOD, *supra* note 90, at 83. Interestingly, Sharswood sets up his conception of attorney role in response to a common criticism of lawyers (then and now): that in every dispute there is a right and wrong and in most the

advocacy is a duty owed to both the court and the client.<sup>116</sup> Nor is the lawyer morally responsible for an erroneous decision made by the judge or jury.<sup>117</sup>

For Sharswood, substantive justice is achieved procedurally. The lawyer's duty to the court is procedural, not substantive. The lawyer has no duty to the court to obtain the "right" result, truth, or justice. The lawyer's duty to the court is virtually the same as the duty to the client; to invoke and protect the client's rights,<sup>118</sup> and to present the client's case according to the client's lawful instructions. Notwithstanding Sharswood's language about truth to the court and the adversary, he understood the lawyer's role to be that of agent; a conception in which the lawyer's duties as officer of the court were consistent with duties to clients.

ii. *Specific Duties.* Sharswood acknowledged that attorneys owe specific duties to the court, but they are limited to candor, the avoidance of wrongful conduct, and respect. Lawyers must not lie to the court:

[A] practitioner ought to be particularly cautious, in all his dealings with the court, to use no deceit, imposition, or evasion-to make no statements of fact which he does not know or believe to be true-to distinguish carefully what lies in his own knowledge from

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lawyer knows which side is right, yet the lawyer will maintain "and often with the appearance of warmth and earnestness," the unjust side. *Id.* at 81-82. "Is he not [the lawyer] then a participator in the injustice?" *Id.* Sharswood's answer:

Now the lawyer is not merely the agent of the party; he is an officer of the court. The party has a right to have his case decided upon the law and the evidence, and to have every view presented to the minds of the judges, which can legitimately bear upon the question. This is the office which the advocate performs. *He is not morally responsible for the act of the party in maintaining an unjust cause, nor for the error of the court, if they fall into error, in deciding it in his favor. The court or jury ought certainly to hear and weigh both sides; and the office of the counsel is to assist them by doing that, which the client in person, from want of learning, experience, and address, is unable to do in a proper manner. The lawyer, who refuses his professional assistance because in his judgment the case is unjust and indefensible, usurps the functions of both judge and jury.*

*Id.* at 83-84 (emphasis added).

116. *See id.* at 83-84.

117. *See id.*

118. *See generally id.* at 83. His selection of the Statute of Limitations defense makes the point. Even though the filing of the action was delayed by the "indulgence or confidence" of the creditor; the rule of law must prevail, i.e., the lawyer can assert the statute of limitations as a defense. *Id.*

what he has merely derived from his instructions-to present no paper-books intentionally garbled.<sup>119</sup>

Lawyers must show respect to the court,<sup>120</sup> not deceive the court<sup>121</sup> or the adversary, must not contact the judge<sup>122</sup> or jury<sup>123</sup> without the adversary,<sup>124</sup> argue personal opinions,<sup>125</sup> urge the jury to violate the law,<sup>126</sup> and be honest in dealing

119. *Id.* at 72 (illustrating his meaning, Sharswood refers to a biography of Sir Mathew Hale in which it was said that Hale abhorred "those too common faults of misreciting witnesses, quoting precedents or books falsely, or asserting anything confidently; by which ignorant juries and weak judges are too often wrought upon") (quoting G. BURNET, *LIFE AND DEATH OF SIR MATHEW HALE* 72 (Rothman Reprints, Inc. 1972) (1682)); see also *infra* notes 164-76 and accompanying text.

120. SHARSWOOD, *supra* note 90, at 62 (noting that the importance of respect, however, did not preclude "firm and decided opposition to the [court's] views, nay, even manly and open remonstrance; but this duty may be faithfully performed, and yet that outward respect be preserved . . ."); see also *infra* notes 164-76 and accompanying text.

121. See SHARSWOOD, *supra* note 90, at 72; see also *infra* notes 166-78 and accompanying text.

122. See SHARSWOOD, *supra* note 90, at 66; see also *infra* notes 166-78 and accompanying text.

123. See SHARSWOOD, *supra* note 90, at 68-69; see also *infra* notes 166-78 and accompanying text.

124. See SHARSWOOD, *supra* note 90, at 73-74.

It is not only morally wrong but dangerous to mislead an opponent, or put him on a wrong scent in regard to the case. It would be going too far to say that it is never advisable to expose the weakness of a client's cause to an adversary, who may be unscrupulous in taking advantage of it; but it may be safely said, that he who sits down deliberately to plot a surprise upon his opponent, and which he knows can succeed only by its being a surprise, deserves to fall, and in all probability will fall, into the trap which his own hands have laid.

*Id.*; cf. RESTATEMENT (SECOND) OF AGENCY § 395 (1958).

125. See SHARSWOOD, *supra* note 90, at 101 (stating that if lawyer's private opinion was based on facts not in evidence, it is improper to assert it. Moreover, such an opinion would rarely be relevant. In this connection, Sharswood cautions against confusing the role of advocate with moral agent. Falsely representing belief in the client's cause is immoral because the lawyer sells himself in addition to expertise. "He makes the moral rule subordinate to the professional rule. He sells to his client not only his skill and learning, but himself. He makes it the supreme object of his life to be not a good man, but a successful lawyer") (quoting 1 WHEWELL'S ELEMENTS OF MORAL AND POLITICAL SCIENCE 259).

126. See SHARSWOOD, *supra* note 90, at 70-71 ("It is best for counsel to say in such cases, where nothing is left by the charge to the jury, that they do not ask for a verdict. It has a fair candid and manly aspect towards court, jury, opposite party, and even client.").

with other lawyers for moral and instrumental reasons.<sup>127</sup> Non-lawyers must, in general, follow the same rules as lawyers and are also subject to sanctions.<sup>128</sup> The difference, of course, is that only lawyers can be the subject of disciplinary proceedings, in addition to the other sanctions.

c. *The Turn of the 20th Century.* In a section of a 1902 treatise on Agency Law entitled "Duty of Attorney to Court," the only duties to the court identified are to be respectful to the judge, adversary, and parties, and to abstain from the use of abusive language.<sup>129</sup> Grounds for disbarment included:<sup>130</sup> libel, false claim of authority to represent, offering to sell information to adversary, felony conviction, receipt of illegal fees, conviction of subornation of perjury, falsifying records, stealing records from the court, swearing falsely, bribing a witness, bringing a gun to court, threatening a judge, etc.<sup>131</sup> Virtually all of this misconduct is against client interests, illegal, or both.

While non-lawyers owe no special duties to the court, they are also subject to penalty for the same sorts of misbehavior.<sup>132</sup> For example, the use of abusive language toward the court or other participants in legal proceedings might well result in a finding of contempt.<sup>133</sup>

d. *Early 20th Century Cases.* Commentators arguing that lawyers have a duty to seek justice role have relied

127. There is a certain instrumental quality to Sharswood's advice; he is quite conscious of the concept: "What goes around comes around." Indeed, his unattributed formulation: "Whoso diggeth a pit shall fall therein, and he that rolleth a stone, it will return upon him." SHARSWOOD, *supra* note 90, at 74.

128. See, e.g., 18 U.S.C. § 1509 (Supp. 1999) (obstruction of court orders); 18 U.S.C. § 401 (Supp. 1999) (contempt); FED. R. CRIM. P. 42(a) (contempt); see also *infra* notes 149-53, 178 and accompanying text.

129. See GEORGE L. REINHARD, A TREATISE ON THE LAW OF AGENCY IN CONTRACT AND TORT § 408 (1902) ("An attorney at the bar is under obligations to deport himself with becoming respect to the court and its officers; and this duty requires him to refrain from abusive language toward both the court, counsel and parties.") (citing *Redman v. State*, 28 Ind. 205 (1867); *Dodge v. State*, 140 Ind. 284 (1895); *Bauer v. Betz*, 99 N.Y. 672 (1885)).

130. See generally *In re Wall*, 13 Fed. 814 (Fla. Cir. Ct. 1882); *Ex parte Cole*, 1 McCrary 405 (Iowa C.C. 1879); REINHARD, *supra* note 129, §§ 409-10 (1902) ("The Relation of the Attorney to the Court").

131. See REINHARD, *supra* note 129, § 410, at 427.

132. Non-lawyers, of course, could not be penalized regarding a license they do not possess.

133. See, e.g., 28 U.S.C. § 401 (Supp. 1999); FED. R. CRIM. P. 42(a).



upon very scant authority to support their position. Even these sources offer little or no comfort for the proposition that lawyers have duties as officers of the court which are inconsistent with duties to clients, or lawyer liability greater or different from the responsibilities to the legal system shouldered by us all.

Advocates of a lawyer role which includes a substantive duty to seek justice role often point to three judicial opinions to support their view:<sup>134</sup>

An attorney at law is an officer of the court. The nature of his obligations is both public and private. His public duty consists in his obligation to aid the administration of justice; his private duty, to faithfully, honestly, and conscientiously represent the interests of his client. In every case that comes to him in his professional capacity, he must determine wherein lies his obligations to the public and his obligations to his client, and to discharge this duty properly requires the exercise of a keen discrimination, and *wherever the duties to his client conflict with those he owes to the public as an officer of the court in the administration of justice, the former must yield to the latter.*<sup>135</sup> *He therefore occupies what may be deemed a quasi judicial office.*

And:

An attorney owes his first duty to the court. He assumed his obligations towards it before he ever had a client. His oath requires him to be absolutely honest even though his client's interests may seem to require a contrary course. *The lawyers cannot serve two masters; and the one they have undertaken to serve primarily is the court.*<sup>136</sup>

Finally, from Chief Justice Cardozo:

Membership in the bar is a privilege burdened with conditions. (citation omitted). The appellant was received into that ancient fellowship for something more than private gain. *He became an*

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134. See generally Gaetke, *supra* note 6 and accompanying text. Most commentators simply refer to the label "officer of the court" as authority without any further elaboration. See *supra* notes 25-27.

135. *Langen v. Borkowski*, 206 N.W. 181, 190 (Wis. 1925) (emphasis added).

136. *In re Integration of Nebraska State Bar Association*, 275 N.W. 265, 268 (Neb. 1937) (emphasis added). The question before the court was whether it should grant a petition submitted by the majority of attorneys in the state for an integrated Bar. Dealing only with the question of whether the Court had the power to determine the organization of the Bar, for our purposes, the opinion is entirely rhetorical. See *id.*

*officer of the court, and, like the court itself, an instrument of agency to advance the ends of justice.* His co-operation with the court was due, whenever justice would be imperiled if co-operation was withheld. . . . He might be censured, suspended, or disbarred for 'any conduct prejudicial to the administration of justice.'<sup>137</sup>

The first quotation is from *Langen v. Borkowski et al.*, a 1925 decision of the Wisconsin Supreme Court<sup>138</sup> in which the court explains that the lawyer's status as a "quasi judicial" officer is limited to the screening function later in the opinion.<sup>139</sup> Lawyers must not "maintain any suit or proceeding which shall appear to him to be unjust, or to any defense except such as he believes to be honestly debatable under the law . . . ."<sup>140</sup> Notably, if in good faith the issue is "fairly debatable," the lawyer as "officer of the court" must obey the client's wishes.<sup>141</sup> Connecting the lawyer's duty to the client with the lawyers' duty to the administration of justice, the court concludes that its capacity to function requires lawyers who are duty bound to their clients.<sup>142</sup> Far

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137. *People ex rel Karlin v. Culkin*, 162 N.E. 487, 489-90 (N.Y. 1928) (emphasis added) (citations omitted); see also *Rubin v. State*, 216 N.W. 513 (Wis. 1927) (holding error to review a judgment of the circuit court of Milwaukee County adjudging Rubin guilty of contempt for refusal to be sworn as a witness); *Ohio Ct. App.*, 26 Ohio Law Bull. 355, 515.

138. See *Langen*, 206 N.W. at 186-90 (claiming a variety of wrongs associated with the judicial process, the plaintiff sued a judge, sheriff, court clerk, a jailer, and the attorneys representing a party in an underlying landlord-tenant and property dispute. The doctrine of judicial immunity was found to apply to the judge and court clerk and neither the sheriff nor the jailer were liable because the papers on which they were entitled to rely were in order. The attorney defendants were alleged to have "counseled and instigated to the court to pursue the unlawful orders" that resulted in plaintiffs' imprisonment. The court reasoned that the lawyers were not liable because their role in the administration of justice requires that they have immunity).

139. *Id.* at 190 ("[I]n this respect he is called upon to exercise his judgment in a manner like that exercised by a judicial officer.").

140. *Id.* (holding that a lawyer is forbidden to: "in bad faith urges . . . upon the court the adoption of a legal proposition which is not honestly debatable, with a view of furthering the interests of his client, [because] he is not aiding, but thwarting, the administration of justice").

141. *Id.* ("If the issue of liability is one which is fairly debatable, then under the oath of office of an attorney, he is not only authorized to present and urge his position upon the court, but in the discharge of his duties toward his client he must do so . . . He is duty bound, however, under his oath, to exercise good faith.").

142. See *id.* at 191.

It is in the interests of the proper administration of justice that counsel shall be courageous and fearless in the discharge of their duties . . . . As

from being inconsistent with being an "officer of the court," the lawyers duty to the client is simply part of that duty.<sup>143</sup>

Chief Justice Cardozo's famous statement from *People ex rel Karlin v. Culkin*,<sup>144</sup> is also often referred to<sup>145</sup> in support of lawyers' independent duties to the administration of justice.<sup>146</sup> When this language is considered in context, it simply does not support the proposition that lawyers as "officers of the court" have substantive duties to seek justice that conflict with those owed clients and that are greater or different than those duties non-lawyers owe to the legal system. The court was investigating claims that:

[E]vil practices were rife among members of the bar. "Ambulance chasing" was spreading to a demoralizing extent. As a consequence, the poor were oppressed and the ignorant overreached. Retainers, often on extravagant terms, were solicited and paid for. Calendars became congested through litigations maintained without probable cause as weapons of extortion. Wrongdoing by lawyers for claimants was accompanied by other wrongdoing, almost as pernicious, by lawyers for defendants. The helpless and the ignorant were made to throw their rights away as a result of inadequate settlements or fraudulent releases.<sup>147</sup>

This investigation was obviously designed to benefit clients. The incidental burdens this investigation imposes

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we cannot have a strong court without courageous and fearless judges, so it is impossible to have a strong bar without courageous and fearless attorneys. Both operate together . . . as part . . . of the judicial system to bring about the best results. A client would rapidly lose his faith in his lawyer if he shrank from assuming a legal attitude on any question which is legally debatable, and which might have a tendency to bring about a successful result of the cause.

*Id.*

143. Not surprisingly, this view is strikingly similar to Sharswood's. *See supra* notes 116-22 and accompanying text.

144. 162 N.E. 487, 488-89 (N.Y. 1928).

145. Professor Gaetke and a number of other authorities rely upon this case. *See Gaetke, supra* note 6, at 43 n.20.

146. *See Karlin*, 162 N.E. at 489-90. The *Karlin* court framed the question as whether "when evil practices are rife to the dishonor of the profession, [the lawyer] may not be compelled by rule or order of the court, whose officer he is, to say what he knows of them, subject to his claim of privilege if the answer will expose him to punishment for crime." The court held that it had the power to direct a general inquiry into claims of lawyer misconduct and that lawyers were required to cooperate. *Id.*

147. *Id.* at 468.

on lawyers as bar members are no different than the duty shouldered by any testifying witness.<sup>148</sup>

Other cases state that when the lawyer's duties as an officer of the court clash with the duty of client loyalty, lawyers are not immune from the application of the general law, in particular the law of torts and contracts.<sup>149</sup> The lawyer's duty of loyalty does not entitle her to keep secret what the law requires be disclosed, or protect non-disclosure that is equivalent to misrepresentation.<sup>150</sup> Lawyers must "disclose material information when the nondisclosure amounts to misrepresentation or when failure to disclose violates discovery rules or other law."<sup>151</sup> This is not to say that an attorney's duty to disclose material information is always identical to those of non-lawyers; it is to say that it is almost always so.<sup>152</sup>

After critical analysis, it is apparent that *Langen* and *Karlin* are strong endorsements of the lawyer's agency role in the adversary system. These authorities do not support the proposition that the lawyer's role as officer of the court includes a substantive duty to seek justice if that duty is inconsistent with the duty of loyalty to the client.

*e. Formal Rules Governing Attorney Conduct.* The codes of professional responsibility are largely creatures of agency law.<sup>153</sup> The codes embody core agency principles such as undivided loyalty to principal,<sup>154</sup> confidentiality,<sup>155</sup> obedience

148. See, e.g., FED. R. CRIM. P. 6 (testimony before grand jury).

149. Lawyers can also be subject to Bar discipline. See, e.g., MODEL RULES, *supra* note 1, Rule 8.5; Crystal, *supra* note 42 (collecting and discussing cases); Perillo, *supra* note 42.

150. See Crystal, *supra* note 42, at 1083 (stating that the lawyer's duty of loyalty to the client and the duty to disclose are compatible because the duty of loyalty does not shield the lawyer from following the law.).

151. *Id.* at 1096.

152. See *id.* (noting that the lawyer's duties of confidentiality are quite significant and are different than non-lawyers, but agents also have confidentiality obligations to principals); *infra* note 258 and accompanying text.

153. See *infra* Part II.

154. See MODEL RULES, *supra* note 1, Rule 7.1 (requiring that lawyers must be loyal to their clients); MODEL CODE, *supra* note 8, DR 5-101-105 (same); RESTATEMENT (SECOND) OF AGENCY §§ 23, 389-94 (1958) (same); MODEL CODE, *supra* note 8, DR 5-10 (insisting that attorneys be free from conflicts); MODEL RULES, *supra* note 1, Rule 1.7 (same); Gaetke, *supra* note 6, at n.67 ("[T]he restrictions upon lawyer-client conflicts of interest assure clients that they are represented by lawyers whose objectives are as single-minded as theirs.").

155. See MODEL RULES, *supra* note 1, Rule 1.6(a) (commanding attorneys to

to the principal's lawful instructions,<sup>156</sup> agent discretion in choosing means to realize the principal's goals,<sup>157</sup> competence,<sup>158</sup> candor and independent judgment,<sup>159</sup> and the general bar prohibiting wrongful conduct.<sup>160</sup> The various ethics codes can be understood as the collective exercise of the agents' discretion and judgment that implements both concepts of agency law such as loyalty, and acting or speaking on behalf of the principal, and speaks to various public policy issues relevant to the law and legal practice.

There are aspects of the Rules<sup>161</sup> that arguably create tension between the attorney's duty of loyalty to the client and the attorney's duties to the courts, although the significance of that tension is much overstated.<sup>162</sup> As an

preserve their clients secrets and confidences); MODEL CODE, *supra* note 8, EC 4-1-4-4, DR 4-101(C)(3).

156. See MODEL RULES, *supra* note 1, Rule 1.2(a) (demanding that an attorney consult with, and obey, the client regarding lawful goals); MODEL CODE, *supra* note 8, EC 7-7 ("[T]he authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer."); cf. RESTATEMENT (SECOND) OF AGENCY § 14.

157. See MODEL RULES, *supra* note 1, Rule 1.2 (stating that client chooses objectives and must be consulted regarding means); *id.* Rule 1.2 cmt. [1] (stating that ultimate authority to determine purpose of representation is clients who also has right to consult with lawyer about means and acknowledging that clear distinction between means and objectives difficult to draw); MODEL CODE, *supra* note 8, EC 7-7 (stating that a lawyer makes decisions that do not substantially prejudice client or affect the merits); *id.* DR 7-101(B) (1) (stating that "[w]here permissible" lawyer may waive or fail to assert position of client).

158. The lawyer must be competent, i.e., prepared and possessed of the skill, and legal knowledge reasonably necessary for the representation. See MODEL RULES, *supra* note 1, Rule 1.1; MODEL CODE, *supra* note 8, EC 6-1 ("Because of his vital role in the legal process, a lawyer should act with competence and proper care in representing clients."); *id.* DR 6-101 ("A lawyer shall not: . . . [h]andle a legal matter which he knows or should know that he is not competent to handle.").

159. See MODEL RULES, *supra* note 1, Rule 2.1 ("[A] lawyer shall exercise independent professional judgement and render candid advice."); MODEL CODE, *supra* note 8, EC 7-8 (stating that lawyer can refer to extra legal factors in assisting client in reaching decision); *id.* DR 5-107(B) (stating that a lawyer shall not permit outside influences, e.g., source of fee, to affect professional judgment).

160. See *infra* Part II.

161. See MODEL RULES, *supra* note 1. Approximately 45 states have adopted the Model Rules, some with modifications. See MARY C. DALY, PROFESSIONAL RESPONSIBILITY: CORPORATE, BUSINESS, AND INTERNATIONAL PRACTICE I-9 (1998). For convenience, unless there are important relevant differences, the Model Rules will be addressed in the text and the corresponding Model Code provisions will be referenced in the footnotes.

162. A detailed comparison of the ethical rules and agency law is beyond the

initial matter, one might fairly suppose that the client wants to win and will want their lawyer to maximize their chances of winning, but clients have no legitimate or lawful interest in obtaining their lawyer's assistance in the commission of illegal conduct.<sup>163</sup> The apparent tension between the lawyer's duties to her clients and duties as an officer of the court begins with the first paragraph of the Preamble, entitled "A Lawyer's Responsibilities." The Preamble identifies three spheres of duties: (1) client representative, (2) "officer of the legal system," and (3) "public citizen having special responsibility for the quality of justice."<sup>164</sup> The Preamble acknowledges that "[v]irtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person while earning a satisfactory living."<sup>165</sup> The Preamble is an excellent example of the rhetoric that has confused the lawyer role for so long<sup>166</sup> because neither it, nor the subsequent rules, set forth responsibilities to seek justice which are seriously in conflict with the lawyer's duty of loyalty to her client. Most of the provisions in the ethical rules do not require more of lawyers than the law requires of us all—obedience.

For example, in court a lawyer shall not make a material false statement of law or fact<sup>167</sup> or offer evidence

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scope of this Article.

163. No doubt some clients will want their attorneys to do absolutely everything—legal or illegal—to win their cause, but most clients will want to play by the rules. See Stephen L. Pepper, *Counseling at the limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L. J. 1545 (1995).

164. MODEL RULES, *supra* note 1, preamble.

165. *Id.* Resolution of these issues is left to the application of "sensitive professional and moral judgement guided by the principles underlying the Rules." *Id.* In the usual case, however, when the opposing party is "well represented" the lawyer can be a zealous advocate and assume that justice will result. *Id.*

166. Yet another example is the 1986 American Bar Association's Commission on Professionalism report, titled "In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism," which asserts that when there is a conflict between the duty of client loyalty and duty to the court, "duty to the system of justice must transcend the duty to the client." AMERICAN BAR ASSOCIATION, IN THE SPIRIT OF PUBLIC SERVICE: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 30 (1986). Further perpetuating the myth, the report urges a greater stress be placed on the officer of the court aspect of lawyer role. See *id.* at 13, 28-30.

167. See MODEL RULES, *supra* note 1, Rule 3.3(a)(1), 4.1 (providing that

known by the lawyer to be false.<sup>168</sup> Attorneys are also prohibited from aiding and abetting a criminal or fraudulent act by the client,<sup>169</sup> shall not "unlawfully" tamper with potential evidence, urge others to do so,<sup>170</sup> or falsify evidence of any type.<sup>171</sup> The lawyer and client must obey court rules and orders.<sup>172</sup> Lawyers are prohibited from knowingly assisting or counseling criminal or fraudulent conduct.<sup>173</sup> Lawyers may not make misrepresentations.<sup>174</sup> A lawyer shall not conceal or knowingly fail to disclose what is required by law to be revealed.<sup>175</sup> Similarly, improper communications between lawyers with judges and prospective jurors violate the ethical rules.<sup>176</sup> This conduct is also proscribed for non-lawyers.<sup>177</sup>

Disruption of the tribunal is prohibited by the ethical rules<sup>178</sup> and the law of contempt.<sup>179</sup> There are special rules

these statements must be made in court); MODEL CODE, *supra* note 8, DR 7-102(A)(5).

168. See MODEL RULES, *supra* note 1, Rule 3.3(a)(4) (providing that if the lawyer subsequently learns that she has offered material false evidence, she must take "reasonable remedial measures").

169. See MODEL RULES, *supra* note 1, Rule 3.3(a)(2); MODEL CODE, *supra* note 8, DR 7-102(B)(1).

170. MODEL RULES, *supra* note 1, Rule 3.4(a).

171. *Id.* Rule 3.4(b).

172. See *id.* Rule 3.4(c); MODEL CODE, *supra* note 8, DR 7-106(A).

173. See MODEL RULES, *supra* note 1, Rule 1.2(d); MODEL CODE, *supra* note 8, DR 7-102 (A)(7).

174. See MODEL RULES, *supra* note 1, Rule 4.1(a) (prohibiting "false statement[s] of material fact or law"); MODEL CODE, *supra* note 8, DR 7-102(A)(5). Rule 4.1(b) addresses the issue of omissions or silence, requiring the lawyer to affirmatively disclose material facts when necessary to prevent the silence from "assisting a criminal or fraudulent act." MODEL RULES, *supra* note 1, Rule 4.1(b); see RESTATEMENT (SECOND) AGENCY § 348 cmt. c (1958) (noting similarity to 4.1(b) cmt. 3, stating that a lawyer may be liable for failure to correct misapprehension); *cf.* Crystal, *supra* note 42, at 1096 (discussing tort and contract consequences applicable to lawyers and non-lawyers).

175. See MODEL CODE, *supra* note 8, DR 7-102(A)(3) (stating that it is improper to conceal or fail to disclose when required by law to do so); Crystal, *supra* note 42, at 1055 (discussing tort and contract consequences applicable to lawyers and non-lawyers).

176. See MODEL RULES, *supra* note 1, Rule 3.5(a)(b); MODEL CODE, *supra* note 8, DR 7-108(A) (B), DR 7-110(B).

177. See, e.g., 18 U.S.C. § 2 (1999) (aiding and abetting); 18 U.S.C. § 1503 (1999) (influencing juror or officer); 18 U.S.C. § 1506 (1999) (theft or record alteration); see also 18 U.S.C. § 1509 (1999) (obstruction of court orders); 18 U.S.C. § 1512 (1999) (witness tampering); 18 U.S.C. § 1512(b)(B)) (1999) (same); 18 U.S.C. § 1623 (1999) (false statements under oath in court or ancillary to court).

178. See MODEL RULES, *supra* note 1, Rule 3.5(c); MODEL CODE, *supra* note 8,

for conduct at trial, but they reflect the rules of evidence and thus are applicable to all.<sup>180</sup> Lawyers<sup>181</sup> and pro se litigants are bound by the prohibitions against filing suits or defenses without foundation or for improper purposes.<sup>182</sup> Neither lawyers, agents, clients, or principals are permitted to engage in, encourage, or assist others to engage in wrongdoing.

There are, however, rules which arguably impose special duties upon lawyers that appear to conflict with the duty of loyalty to the client and with which non-lawyers may not be required to abide: (1) lawyer's duty to take "reasonable remedial measures" if she learns that she presented false evidence,<sup>183</sup> (2) lawyer's duty not to make public statements that might substantially prejudice the parties ability to achieve a fair result,<sup>184</sup> (3) the duty in ex parte proceedings to fully disclose all material information,<sup>185</sup> and (4) the duty to disclose relevant legal

DR 7-106(C).

179. See, e.g., 18 U.S.C. § 401 (1999); FED. R. CRIM. P. 42.

180. See generally, e.g., FED. R. EVID.; MODEL RULES, *supra* note 1, Rule 3.4(e) (stating that reasonable belief that a matter is relevant or that evidence to support it will be admissible required before alluding to it, statement of personal opinion improper unless relevant).

181. See MODEL RULES, *supra* note 1, Rule 3.1. The Model Code is similar but contains three differences, (1) the Code's test of improper conduct is "merely to harass or maliciously injure," MODEL CODE, *supra* note 8, DR 7-102(A)(1), whereas the Rules require that the position "not [be] frivolous." MODEL RULES, *supra* note 1, Rule 3.1; (2) the Code's test is subjective in that the lawyer had to "know" or it had to be "obvious" that the position was frivolous, and (3) the Rules explicitly permit a lawyer representing a client in a matter which could result in incarceration to force the other side to establish every element of the action. See *id.*; MODEL CODE, *supra* note 8, DR 7-102(A)(1)(2).

182. See FED. R. CIV. P. 11(b) ("[A]n attorney or unrepresented party."); *Lerch v. Boyer*, 929 F. Supp. 319 (N.D. Ind. 1996) (holding that Rule 11 is applicable to pro se litigants).

183. See MODEL RULES, *supra* note 1, Rule 3.3(a)(4).

184. See *id.* Rule 3.6; MODEL CODE, *supra* note 8, DR 7-107. One might contend that public relations is not part of the special expertise the lawyers as independent contractors offer, it therefore is not is not part of the lawyer's agency role at all. See generally David A. Strauss, *Why It's Not Free Speech Versus Fair Trial*, 1998 U. CHI. LEGAL F. 109 (1998); Gerald F. Uelman, *Leaks, Gags and Shields: Taking Responsibility*, 37 SANTA CLARA L. REV. 943 (1997). For criticism of Rule 3.6 see Joel H. Swift, *Model Rule 3.6: An Unconstitutional Regulation of Defense Attorney Trial Publicity*, 64 B.U. L. REV. 1003 (1984) (arguing that regulation of defense attorneys is unnecessary and unconstitutional).

185. See MODEL RULES, *supra* note 1, Rule 3.3(d). The Model Code has no counterpart.



authority directly adverse to the client's position.<sup>186</sup>

Failure to correct false evidence will likely result in the wrong outcome; prejudicial public statements will possibly contaminate prospective fact-finders thus creating a risk of a wrong result; both the failure to disclose all relevant information in ex parte proceedings, and failing to alert the court to directly adverse legal authority could result in the court deciding incorrectly. These four rules prevent the lawyer from being involved in wrongdoing, which is an important component of agency law.<sup>187</sup>

The observation that avoidance of wrongdoing is consistent with agency law, however, doesn't answer the question of whether non-lawyers have similar responsibilities. In fact, the principles underlying these rules also apply generally to non-lawyers and provide sanctions for their violation.<sup>188</sup> Non-lawyers are bound to correct representations believed to be true when made but subsequently learned to be false.<sup>189</sup> Those who make false public statements prejudicial to a fair trial may face a defamation action and, even if the statements are true, may be subject to a gag order and consequences for its violation.<sup>190</sup>

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186. See *id.* Rule 3.3(a)(3); MODEL CODE, *supra* note 8, DR 7-106(B)(1). These rules are very limited in application. They require disclosure of "[l]egal authority in the controlling jurisdiction known to [the lawyer] to be directly adverse to the position of his client . . ." *Id.* The client, of course, might be better off (at least in the short term) if the lawyer were not required to disclose directly adverse authority.

187. See RESTATEMENT (SECOND) OF AGENCY § 19 (1958).

188. See generally Crystal, *supra* note 42, at 1055.

189. Greycas, Inc. v. Proud, 826 F.2d 1560 (7th Cir. 1987) (holding lawyer liable for negligent misrepresentation that induced detrimental reliance); Dyke v. Zaiser, 182 P.2d 344, 351 (Cal. Dist. Ct. App. 1947).

[O]ne has a right to rely on statements of material facts essentially connected with the substance of the transaction where one of the parties is ignorant or inexperienced in regard to matters concerning which material representations are made, and such ignorance is known to the other party, who is also aware that reliance is being placed on his representations, and that the facts are not, and cannot be expected to be, within the first party's knowledge.

*Id.*; see Geoffrey C. Hazard, Jr., *The Lawyer's Obligation to be Trustworthy when Dealing with Opposing Parties*, 33 S.C. L. REV. 181, 189 (1981) ("The law of fraud as generally understood requires revelation where necessary to correct a material misstatement when the lawyer has become aware of an inaccuracy.") (citing RESTATEMENT (SECOND) OF TORTS § 551 (1976); see also RESTATEMENT (SECOND) OF AGENCY § 348 (1958).

190. Notwithstanding the prohibition in Rule 3.6(a), a lawyer may

The rules regarding the full disclosure of relevant information in ex parte applications and the duty to cite directly adverse legal authority, at first seem to impose obligations on attorneys inconsistent with client's interests and different from the obligations borne by non-lawyers. These impositions (if they actually exist) are trivial both in terms of likely substantive effect on the client and frequency of occurrence. The test to determine if a non-lawyer owes a duty different from a lawyer is: Would a pro se party have to disclose relevant information in an ex parte application or directly adverse authority known to her? The cases are legion stating that courts should liberally construe submissions of non-lawyers representing themselves,<sup>191</sup> however, statutes, court rules, (and cases where relevant) generally apply explicitly to attorneys and parties.<sup>192</sup>

Applications without notice to one's adversary are typically made in emergencies to preserve the status quo and/or prevent irreparable harm. As with virtually all applications made to courts, ex parte applications require a statement under oath justifying the relief requested.<sup>193</sup> In

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communicate just about anything to "protect a client from . . . substantial undue prejudicial" publicity. See MODEL RULES, *supra* note 1, Rule 3.6(c). For practical and legal reasons this obligation is exceptionally weak and narrow. As discussed in *Gentile v. Nevada*, the First Amendment provides almost total protection for the attorney's communication, and the chance of demonstrating a "substantial likelihood of material . . ." prejudice is quite small. 501 U.S. 1030 (1991). In yet another example of rhetoric without analysis in this area, the Court said in dicta that attorneys in the criminal justice system had "fiduciary obligations to the court and the parties," without identifying those responsibilities or their source. *Id.* at 1057. Also without elaboration, the Court opined that the lawyer's public statements might violate "other established duties." *Id.* at 1057.

191. See, e.g., *Johnson v. Reagan*, 524 F.2d 1123, 1124 (9th Cir. 1975); *Gordon v. Crouchley*, 554 F. Supp. 796, 797 (D.R.I. 1982) (same); *Mobley v. McCormick*, 160 F.R.D. 599, 600 (D. Colo. 1995) (stating that the court should consider less extreme sanctions than dismissal when litigant appears pro se); *Young v. Corbin*, 889 F. Supp. 582, 585 (N.D.N.Y. 1995) (explaining that while Rule 11 applies to pro se parties that status must be considered in determining whether their conduct was reasonable). The scenario envisioned by this question, that of the non-attorney pro se party discovering the relevant, directly adverse authority, and knowingly failing to disclose it, seems unlikely.

192. See, e.g., FED. R. CIV. P. 11(a) (requiring that all pleadings, motions, and other papers must be signed by the attorney, or if unrepresented, by the party).

193. Under such circumstances, it is extremely likely that a judge would inquire as to whether there is relevant undisclosed information.

addition, under some circumstances an undertaking or bond is mandatory.<sup>194</sup> The application process for *ex parte* relief, therefore, contains some assurances that lawyers and non-lawyers alike will supply the court with full disclosure or face perjury sanctions and/or the possibility of financial loss.<sup>195</sup> This is separate from, and in addition to, the attorney's ethical responsibilities.

Can a non-lawyer *pro se* litigant be penalized for failing to disclose directly adverse legal authority?<sup>196</sup> Arguably, knowing silence is the equivalent of misrepresentation.<sup>197</sup> But even if one concludes that this is a special obligation to the court not imposed on non-lawyers and inconsistent with the duty of loyalty to the client,<sup>198</sup> its practical consequences are few. In many instances, there will be timely discovery of the directly binding legal authority.

In the end, the one duty to the court imposed on lawyers inconsistent with the duty of loyalty to the client is the duty under the Rules to cite directly adverse authority. The characterization officer of the court is based on little more than self-serving rhetoric and does not include a substantive duty to seek justice that is at odds with the duty of loyalty and zealous advocacy. A lawyer does not owe the court any duty of consequence greater than the non-lawyer.

## II. AGENCY LAW

The central role of the lawyer is that of agent for clients. Lawyers speak and act on behalf of and at the

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194. See, e.g., *Skolnick v. Harlow*, 820 F.2d 13 (1st Cir. 1987) (directing *pro se* plaintiff to post \$5000.00 or deed in favor of defendant).

195. In any event, concealment of information is, at best, only in the client's short-term interest. When the matter is no longer *ex parte*, the concealed matter will be disclosed and the court will respond accordingly. Improper concealment is a basis to reopen settlements and judgments. See generally *Crystal*, *supra* note 42, at 1096 (discussing tort and contract consequences applicable to lawyers and non-lawyers).

196. The scenario envisioned by this question, that of the non-attorney *pro se* party discovering the relevant, directly adverse authority, and knowingly failing to disclose it, seems unlikely.

197. See generally *Crystal*, *supra* note 42, at 1096 (discussing tort and contract consequences applicable to lawyers and non-lawyers).

198. One might also argue that this rule is bad and should be disregarded. Attorneys are not required to disclose facts of a similar character which—if the goal were really justice-seeking as opposed to judicial face-saving—might also be required.

direction of others. Lawyers provide individuals access to the law, permit disputes to be resolved according to the law, and allow individuals to determine their own affairs.<sup>199</sup> This is the reach, and limit, of the lawyer's role as regards the supposed conflict between the duty of loyalty to the client and the duty to seek justice. Claims that lawyers should be free to disobey the client's lawful instructions must be scrutinized very carefully, lest the fundamental characteristic of lawyer role disappear and lawyers assume the role of judges.

Since ancient Greece, individuals have spoken for, or acted on behalf, of others at their direction in legal proceedings. This historical fact should weigh heavily in our discussion; because if lawyers ought to have a substantive duty to seek justice, the nonexistence of such a role after many centuries of lawyering should cause us to proceed very carefully before adopting such a significant change. The lack of serious discussion of agency law by contemporary scholars of professional ethics and roles,<sup>200</sup> as well as its diminishing place in law school curriculums, inhibits informed analysis and requires the following discussion.

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199. See Pepper, *supra* note 163, at 1545-46 ("The primary job of the lawyer is to give the client access to the law in its multitude of facets."); Charles Fried, *The Lawyer as Friend*, 80 YALE L. J. 1060, 1073 (1975) (client should be able to rely on attorney to realize the autonomy the law recognizes); Rob Atkinson, *Beyond the New Role Morality for Lawyers*, 51 MD. L. REV. 853, 860 (1992) ("The law does not quite condone the actions that it does not condemn, but in permitting these actions it expresses a preference for individual autonomy over collectively defined 'right' behavior.").

200. The volume of scholarship about legal ethics and professional roles has increased substantially in recent years; however, few commentators write about agency law. *But see* Deborah DeMott, *The Lawyer as Agent*, 67 FORDHAM L. REV. 301 (1998) (providing an example of an exception); Geoffrey C. Hazard, Jr., *Lawyer Liability in Third Party Situations: The Meaning of the Kaye Scholer Case*, 26 AKRON L. REV. 395 (1993) (same); Arnold I. Siegel, *Abandoning the Agency Model of the Lawyer-Client Relationship: A New Approach for Deciding Authority Disputes*, 69 NEB. L. REV. 473 (1990) (claiming that the "substance/procedure" distinction used to decide scope of authority issues is flawed and recommending a balancing test); Paul R. Tremblay, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client*, 31 UTAH L. REV. 515 (1987).

A. *A Short History of the Agency Relation in Legal Proceedings*

1. *Introduction.* Agents in legal proceedings have always been required to obey the lawful instructions of their clients. In ancient Greece, the Roman Empire, and medieval England there were assistants who spoke or wrote on behalf of others in their presence, or at their direction. In the Roman Empire and medieval England, individuals performed the function of agent in legal proceedings. When the assistant had the power to act for the client in the client's absence, the assistant was an agent in the modern sense. The client's right to appoint an agent was slow to receive acceptance in part because of the common belief in early societies that "every man ought to fight his own battles."<sup>201</sup> This belief existed in ancient Greece,<sup>202</sup> the early Roman Empire,<sup>203</sup> and in medieval England.<sup>204</sup> Because of this belief, individuals were required to personally appear and speak for themselves in legal proceedings.<sup>205</sup> Parties to legal disputes, however, could, and commonly did, avail themselves of lay or experienced assistance.<sup>206</sup> The assistant performed an advocacy role, speaking on behalf of the party, in accordance with the party's instructions, and (if experienced) provided some level of expertise.<sup>207</sup> The party could appear with the assistant, but the assistant could not

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201. See, e.g., ANTON-HERMAN CHROUST, *THE RANKS OF THE LEGAL PROFESSION IN ENGLAND* 571 (1960) [hereinafter CHROUST, *THE RANKS*].

202. See also ANTON-HERMAN CHROUST, *THE LITIGIOUS ATHENIAN* 123 (1998) [hereinafter CHROUST, *LITIGIOUS ATHENIAN*] (stating that Greeks "believed that a man should either fight his own battles or steer clear of them in the first place. . . . In this way, he could reestablish his manly reputation by taking vengeance personally for his opponents slight to his honor").

203. See POUND, *supra* note 45, at 38.

204. See CHROUST, *THE RANKS*, *supra* note 201, at 571.

205. See *id.*

206. Lay assistance was normally provided by friends or family. See CHRISTIAN, *supra* note 44, at 9.

[I]t appears that attorneys also had ceased to be lay friends casually assisting in suits and they too had become a professional class. One passes from the consideration of the origin of that class in the unfeud assistance of private friends to the century consisted of people who performed this service with some regularity.

*Id.*

207. See *id.*

speak on behalf of the party when the party was absent.<sup>208</sup> The assistant had no legal power to bind the party<sup>209</sup> unless the party was present and agreed to be bound by the advocate's statements. Since the party was always present with the advocate, any deviation from the client's instruction could be corrected by the party. In early societies, parties to legal disputes commonly relied upon the assistance of advocates who performed a role similar to present day lawyers except for one significant respect: In the absence of the party, early advocates did not possess the power to alter the legal relation of that party with respect to third parties and thus were not agents as defined in modern terms.<sup>210</sup>

2. *Representatives in Medieval England.* In early medieval England, parties appeared personally before the tribunal to plead their own cause;<sup>211</sup> representation by another in the absence of the party was permitted only with royal consent.<sup>212</sup> There were, however, "pleaders"<sup>213</sup> who commonly accompanied the litigants and advised and spoke

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208. See CHROUST, *THE RANKS*, *supra* note 201, at 571.

209. See CHROUST, *LITIGIOUS ATHENIAN*, *supra* note 202, at 111.

210. See *infra* notes 253-58 and accompanying text.

211. See Rose, *supra* note 43, at 8; see also BRAND, *supra* note 43, at 3-13; POUND, *supra* note 45, at 77 n.1 (noting that the general rule was that a litigant, in ordinary circumstances, must appear in court); see also Frederic William Maitland, *Legal Reform Under Edward I*, in 2 *SOCIAL ENGLAND* 45 (Caswell & Co. 1902) (1894) (indicating that according to Maitland, the rule requiring personal pleading was also justified on fairness grounds, i.e., the presence of an expert representing only one side would be unfair); ROBERT ROBSON, *THE ATTORNEY IN EIGHTEENTH CENTURY ENGLAND* 1-2 (1959) (explaining that the appointment of an attorney was uncommon because it conflicted with early notions of the law).

212. See Rose, *supra* note 43, at 16 (stating that appointment by "royal prerogative" was replaced by statutory and and judicial authorization); see also POUND, *supra* note 45, at 85-86.

213. See Rose, *supra* note 43, at 20-27 (stating that pleaders were also called *narratores*, *countors*, or *serjeants*; those performing this role are now called "barristers." In medieval England there were two other names by which participants in the legal profession were known: "apprentices," who by the end of the 13th century were representing clients and practicing law as attorneys, and *Essoiners*, whose role was to "appear in court and make excuses ('cast an ession') for the nonappearance of a party); see also CHRISTIAN, *supra* note 44, at 4 (noting that for the last 200 plus years in England, attorneys have been known as solicitors); POUND, *supra* note 45, at 78-79 (explaining that this distinction between pleader and attorney mirrors the practice in ancient Rome where there were advocates and *jurisconsults*).

on their behalf.<sup>214</sup> Initially, the roles of pleader and attorney<sup>215</sup> were filled by friends and relatives of the party or litigant.<sup>216</sup>

During the reigns of Henry III (1216-1272) and Edward the I (1272-1307), common law courts were formed in which individuals represented others.<sup>217</sup> The rule requiring personal attendance and pleading by the parties was gradually relaxed.<sup>218</sup> Once appointed, an attorney represented the party as agent and could appear in lieu of the party.<sup>219</sup> In contrast, the pleader or serjeant<sup>220</sup> spoke on behalf of the litigant who was before the court, either in person or by attorney,<sup>221</sup> but did not act as agent and could not bind their clients.

Our modern agency law doctrine is derived from medieval England. The law of Master and Servant is hundreds of years old and dealt with servants who

214. See Rose, *supra* note 43, at 8-9; see also BRAND, *supra* note 43, at 3, 12; ROBSON, *supra* note 211, at 1-2 (stating, while representation by an attorney was rare, "the assistance of a pleader was commonly allowed and was entirely in harmony with these ideas"); POUND, *supra* note 45, at 78-79.

215. See POUND, *supra* note 45, at 95 (explaining that the word "attorney" originally meant agent).

216. See Rose, *supra* note 43, at 9-10 nn. 23-31; BRAND, *supra* note 43, at 10, 46, 69.

217. See POUND, *supra* note 45, at 78 (stating that the common-law courts had become well-established before the reign of Edward I); see also Rose, *supra* note 43, at 8-9. A confluence of factors actually beginning during the reign of Henry II (1154-89), contributed to the growth of a legal profession. Changes in the court system included greater national emphasis, the presence of expert judges, and increased complexity in the litigation process. See *id.* at 17.

218. See Rose, *supra* note 43, at 14-15; see also BRAND, *supra* note 43, at 45; CHRISTIAN, *supra* note 44, at 3.

Gradually, then, the rule of personal attendance was relaxed, and the litigant was allowed to appoint another as his attorney formally to appear for him and transact matters of routine. He was also permitted to have a friend to address the Court on his behalf at the trial, he himself, or his attorney, being present and adopting as his own the words used by his more fluent or learned friend on his behalf.

*Id.*

219. See 8 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 222 (1922-1972) ("The attorney was an agent for purposes of litigation.").

220. See *supra* notes 49, 213-16.

221. See Rose, *supra* note 43, at 20-22; see also BRAND, *supra* note 43, at 87; SIR FREDERICK POLLOCK & WILLIAM MAITLAND, HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 195 (1895) ("[T]hese two branches have different roots; the attorney represent his client, appears in his client's place, while the counter speaks on behalf of a litigant who is present in court, either in person or by attorney.").

performed physical labor over whom the master had broad control.<sup>222</sup> Typically, the label "servant" referred to "wage labor,"<sup>223</sup> commonly manual labor. As early as the middle ages the term was "frequently applied . . . to persons who did not perform manual labor but who were managerial, supervisory, or fiscal agents."<sup>224</sup> Persons acting as higher servants "were referred to in the words now used to indicate particular types of agents, that is, factors, brokers, attorneys."<sup>225</sup> Different roles developed from servant that allowed one in a "superior [or] ministerial capacity" to speak and act for another.<sup>226</sup> The law governing these "higher servants" was different from the law controlling the relationship between "common servants" and their masters.<sup>227</sup> The law regarding "higher servants" became the basis for modern agency doctrine,<sup>228</sup> but because both types of employees served masters they were both called servants.<sup>229</sup>

3. *Agents in Legal Proceedings in the Roman Empire.* Initially, Roman law did not "have modern ideas of agency."<sup>230</sup> In early Roman law, the "agent" could not legally

222. See ROBERT J. STEINFELD, *THE INVENTION OF FREE LABOR: THE EMPLOYMENT RELATION IN ENGLISH AND AMERICAN LAW AND CULTURE, 1350-1870* 15-54 (1991) (stating that during the period 1350 to 1870, the label "servant" was used to refer to a wide range employment relations.); see also HAROLD GILL REUSCHLEIN & WILLIAM A. GREGORY, *HANDBOOK ON THE LAW OF AGENCY AND PARTNERSHIP* 4 (1979); cf. RESTATEMENT (SECOND) AGENCY §§ 218, 220 introductory note (1958) (stating that where the actor handles physical property or engages in physical conduct she is usually considered a servant); RESTATEMENT (SECOND) OF AGENCY § 2(1)-2(2); WARREN A. SEAVEY, *HANDBOOK OF THE LAW OF AGENCY* 83(B) (1964). Examples of this type of agent are household servants and many employees of businesses.

223. STEINFELD, *supra* note 222, at 17-20.

224. *Id.* at 18 (noting that in 1765 Blackstone, and in 1816 American Writer Tapping Reeve, used the phrase "higher servants" to refer to stewards, bailiffs, and factors; they were relying on common usage that went back to the 13th century); see WILLIAM BLACKSTONE, *COMMENTARIES* \*415; TAPPING REEVE, *LAW OF BARON AND FEMME* 493 (1816).

225. RESTATEMENT (SECOND) OF AGENCY § 218.

226. *Id.* (citing WILLIAM BLACKSTONE, *COMMENTARIES* \*427).

227. See *infra* notes 264-65 and accompanying text (describing how the law differed as between servants and "higher servants," agents and independent contractors).

228. STEINFELD, *supra* note 222, at 18.

229. See *id.* at 19.

230. POUND, *supra* note 45, at 37-38 ("Roman law, however, did not have modern ideas of agency."); see J.A. CROOK, *LEGAL ADVOCACY IN THE ROMAN*



bind the "principal" directly, and the principal was not directly legally liable to the agent.<sup>231</sup> The agent was responsible for her own acts; they were not legally viewed as having been done by the principal.<sup>232</sup> By special arrangement, however, the agent was contractually bound to give any award to his principal; similarly, the principal was obligated to indemnify the agent for loss and expense.<sup>233</sup> Eventually Roman law required that judgments be directly transferred to the appropriate party and "agents for litigation had become truly attorneys."<sup>234</sup>

These attorneys, called *jurisconsults*,<sup>235</sup> played a role that included contemporary notions of the agent-principal relation.<sup>236</sup> Roman lawyers provided four primary services for their clients. They "represent[ed] parties in initiating legal action and in carrying out the various steps in the complicated legal procedure required prior to the actual trial,"<sup>237</sup> "plead the case before the courts on behalf of a client,"<sup>238</sup> answered questions of law including questions of substance and procedure for private parties and magistrates, and executed legal documents of all sorts.<sup>239</sup> By

WORLD 111 (1995) ("Early Roman law lacked modern conceptions of agency.")  
 Oliver Wendell Holmes, *Agency*, 4 HARV. L. REV. 345, 350 (1891).

231. See POUND, *supra* note 45, at 38.

Roman Law, however, did not have modern ideas of agency. What the agent did was not thought of as done by his principal. As the law saw it, what the agent did, he did himself. But he was bound contractually that the benefit of what he did should inure to his principal, and the principal was bound contractually to indemnify the agent for loss and expense incurred in his carrying out the agency in good faith.

*Id.*; see CROOK, *supra* note 230, at 111.

232. See CROOK, *supra* note 230, at 111; see also Holmes, *supra* note 230, at 350.

233. See CROOK, *supra* note 230, at 111.

234. POUND, *supra* note 45, at 39 ("Later the simpler device obtained of a transfer of the judgement to and against the real parties by operation of law. When this step had been taken, the agents for litigation had become truly attorneys."); see also CROOK, *supra* note 230, at 111.

235. See Chroust, *The Legal Profession*, *supra* note 67, at 144-45.

[The *jurisconsult*'s] main function was to instruct clients who had the good sense to call an expert rather than on a charlatan. He advised them how to draw up a contract or to draft a will in order to produce the desired results; he instructed them on their legal rights and duties, and on possible legal remedies.

*Id.*

236. Cf. CROOK, *supra* note 230.

237. Chroust, *The Legal Profession*, *supra* note 67, at 109.

238. *Id.*

239. See *id.*

the third century, the advocate's role was firmly established in the Roman legal community, a role separate from that of a *jurisconsult*.<sup>240</sup>

4. *Advocacy in Ancient Greece*.<sup>241</sup> In ancient Greece, individuals that provided assistance to parties in legal proceedings were typically friends or relatives of the party.<sup>242</sup> There were two primary professional roles for advocacy: "*synegeros*," and "*logographos*." One who acted or spoke on behalf of others was called *synegeros*.<sup>243</sup> During the Athenian era the term *syndic*, which came to mean "agent," and *synegeros*,<sup>244</sup> were considered to be interchangeable words.<sup>245</sup> Broken into its etymological roots, *syndic* means "one who intervenes in a legal proceeding."<sup>246</sup>

In ancient Greece, parties in litigation also employed *logographos* or speech-writers.<sup>247</sup> The *logograph* was paid to write a speech on behalf of the client,<sup>248</sup> who in turn

240. See POUND, *supra* note 45, at 46 ("By Cicero's time the function of *jurisconsult* and that of advocate had begun to be differentiated. It was well differentiated in the classical period of Roman law from Augustus (emperor B.C. 27 A.D. 14) to Alexander Severus (A.D. 222-235).").

241. My limited purpose in briefly examining the history of ancient Greece is to demonstrate that a role existed in that society in which individuals spoke or acted on behalf of others at the other's direction.

242. See POUND, *supra* note 45, at 31-32; see also FORSYTH, *supra* note 75.

243. See POUND, *supra* note 45, at 32; CROOK, *supra* note 230, at 33 (Crook defines the "*synegoria*" as one who simply provided "friendly assistance given for nothing."); see also *id.* ("[T]here was nothing to prevent [the litigant] from being supported and assisted by a cloud of friends or well-wishers, to cheer, testify or plead on his behalf.").

244. See Pound, *supra* note 45, at 34 (describing *synegeros* as "something very like an advocate").

245. See *id.*

246. *Id.* ("There was no clear differentiation of the function of the agent for litigation from that of the advocate. The word *syndic* (which came to mean agent) and *synegoros* (which denoted something very like an advocate) were often used as an synonyms. Etymologically, *syndic* means one who intervenes in a legal proceeding.").

247. See *id.* at 32-33.

It was a difficult task for the ordinary man, even at Athens where citizens were accustomed to public speaking in the political assemblies, to present one's own case before so large a tribunal. The timid, the inexperienced, the ignorant were at a great disadvantage before such a court as compared with trial before a single judge who by questioning can patiently and skillfully bring out what is to be said on both sides.

*Id.*

248. See *id.* at 33-34 ("Above all he had to know how to adapt the speech he wrote to the age, the condition, and the character of his clients and make it

memorized it and presented it to the tribunal.<sup>249</sup> It was the logographer's responsibility to know Athenian law and to be able to fashion an argument that would appeal to the tribunal.<sup>250</sup> In addition, the logographer determined legal strategy and analyzed the prospective jury to discern their "passions and prejudices."<sup>251</sup> These responsibilities are also central to the modern advocate's tasks.<sup>252</sup>

### B. Modern Agency Law

An agency relation is created by agreement.<sup>253</sup> The agency relation may also exist by operation of law even in the absence of the parties' awareness that they even entered into an agency relationship.<sup>254</sup> The principal agrees that the agent will act on her behalf and with her permission or at her direction with the power to effect her legal relations with third parties (within the scope of the authority conferred).<sup>255</sup> The agent agrees to act in

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seem to flow naturally from the mouth of the speaker.").

249. *See id.* at 33; *see also* CROOK, *supra* note 230, at 33 (stating that the logographer might also give advice, act as a solicitor, "coach" one in the art of speech-giving, or act as a *synegeros*).

250. *See* POUND, *supra* note 45, at 33 (discussing that as with present day advocates, the logographer's knowledge of the law and the tribunal might lead to an argument that the law required a particular result for the client or the argument might urge the tribunal in the direction of sympathy).

251. *Id.*

252. *See id.*

253. *See* F.E. Dowrick, *The Relationship of Principal and Agent*, 17 MOD. L. REV. 36 (1954); RESTATEMENT (SECOND) OF AGENCY § 15 (1958); SEAVEY, *infra* note 256, §§ 2, 3; *see also* RESTATEMENT (SECOND) OF AGENCY §§ 1, 3B ("The term 'principal' describes one who has permitted or directed another to act for his benefit and subject to his direction and control. 'Agent' describes a person who has undertaken to act for another and to be controlled by the other in so acting."); *id.* §§ 1 cmt. a, 15.

254. *See* DANIEL S. KLEINBERGER, AGENCY AND PARTNERSHIP § 1.2.4 (1995) (discussing agency relations, a category of business and interpersonal relationships, attaches whether the parties had the legal concept in mind and whether they contemplated the consequences of having the label apply); LEONARD LAKIN & MARTIN SCHIFF, THE LAW OF AGENCY 97 (1996); *see also* Dowrick, *supra* note 253, at 36; RESTATEMENT (SECOND) OF AGENCY § 1 cmt. b.

255. *See* Dowrick, *supra* note 253, at 36 ("The essential characteristic of an agent is that he is invested with a legal power to alter his principal's legal relations with third persons: the principal is under a correlative liability to have legal relations altered."); *id.* at 37 ("[W]hen an agent acts on behalf of his principal in a legal transaction and uses the principal's name, the result in law is that the principal's legal position is altered but the agent himself drops out of the transaction."); RESTATEMENT (SECOND) OF AGENCY § 21 cmt. a & b.

accordance with the highest standards of loyalty<sup>256</sup> and obedience in carrying out the purpose of the agency relationship.<sup>257</sup>

All agents are fiduciaries.<sup>258</sup> All agents must: (1) exercise reasonable care and skill in the performance of their duties,<sup>259</sup> (2) act in good faith and with undivided loyalty,<sup>260</sup> (3) keep information acquired during the course of

256. See WARREN A. SEAVEY, *HANDBOOK OF THE LAW OF AGENCY* §§ 2, 3 (1964) (discussing agency as a fiduciary relation created by law in which the principal has a right to control the conduct of the agent, and the agent has a power to affect the legal relations of the principal); DeMott, *supra* note 200, at 316 (stating that the agent's duty of loyalty can be modified. With the principals consent, the agent may compete, use confidential information, self-deal, etc., however, the essential legal character of the relationship cannot be altered); RESTATEMENT (SECOND) OF AGENCY § 434.

257. See SEAVEY, *supra* note 256, §§ 2, 3, 3B, at 140 (stating that the duty of obedience is peculiar to agency law.); see also DENNIS HYNES, *AGENCY AND PARTNERSHIP* 203 (1989) (stating that the agent must obey all reasonable directions from his principal. The duty to obey is unique to agency and distinguishes the agent from all other fiduciaries. An agent "has no duty to perform acts which are illegal, unethical or unreasonable, however." (quoting WILLIAM EDWARD SELL, *AGENCY* 116 (1975))); *King v. Bankerd*, 492 A.2d 608, 611 (Md. 1985) (stating that the main duty of agent is loyalty to the interest of his principal, agent is under duty to serve principal with only principal's purpose in mind.); *Elco Shoe Manufacturers v. Sisk*, 183 N.E. 191, 191-92 (N.Y. 1932) (stating that agent must constantly exercise the utmost good faith toward principal, and act according to the highest and truest moral principles); RESTATEMENT (SECOND) OF AGENCY § 385 (1958).

258. See Dowrick, *supra* note 253, at 28-32 (stating that the doctrine of fiduciary responsibilities is historically an extension of the law of trusts and lies in equity); RESTATEMENT (SECOND) OF AGENCY § 13; LEONARD LAKIN & MARTIN SCHIFF, *THE LAW OF AGENCY* 11, 97 (1996) (stating that the nature of agency relationship involves the principal entrusting fortune, reputation, and legal rights and responsibilities to agent whose actions, for better or worse, vitally affect the economic well-being and reputation of the principal); see also RESTATEMENT (SECOND) OF AGENCY § 13.

259. See WILLIAM PALEY, *A TREATISE ON THE LAW OF PRINCIPAL AND AGENT* § 2 (J.H. Lloyd ed., American ed., 3d London) (1840) (discussing how agent must "possess such a competent degree of skill and knowledge in his business, as would, in ordinary cases, be adequate to the accomplishment of the service undertaken") (quoting *Russell v. Palmer*, 95 Eng. Rep. 837, 2 Wils. 325 (K.B. 1767)); LAKIN & SCHIFF, *supra* note 258, at 97; see also SEAVEY, *supra* note 256, §§ 140B, 140C; RESTATEMENT (SECOND) OF AGENCY § 379. See generally *McCauley v. Georgia Railroad Bank*, 157 N.E. 125 (N.Y. 1927) (holding that agent's failure to exercise care either through inattention or intent to defraud is a breach of duty); *State Auto & Cas. Underwriters v. Salisbury*, 494 P. 2d 529 (Utah 1912) (stating that the duty of an agent is to obey instructions of his principal and exercise reasonable skill and ordinary diligence).

260. See KLEINBERGER, *supra* note 254, § 4.1.1 (emphasizing that loyalty is a "hallmark characteristic" of the agency relation. The agent must be selfless,

employment confidential,<sup>261</sup> (4) fully inform the principal as to all matters relevant to the principal's interest,<sup>262</sup> (5) obey the principal's lawful instructions<sup>263</sup> (the agent is not bound to follow instructions if they are illegal or unethical),<sup>264</sup> (6)

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making dominant the principal's goals and wishes. The agent is only a means to accomplish the principal's ends; SEAVEY, *supra* note 256, § 147A ("[W]ithin the area of his employment and when not acting in the protection of a superior or equal interest, his duty is to give single-minded attention to the principal's affairs and to subordinate personal interests, except with the principal's consent."); *id.* § 149A (stating that an agent who makes contracts or gives advice is entitled to be free from pressures and temptations which may lead him to give less than full-hearted services); *Rothschild v. Brookman*, 2 Dow. & Cl. 188, 199 (1831); RESTATEMENT (SECOND) OF AGENCY §§ 380, 387 cmt. b (stating that the agent is under a duty not to act or speak disloyally in matters connected with his employment except to protect his own interests or those of others). See generally *Bennett v. Shamilzadeh*, 121 N.Y.S.2d 805 (N.Y. Sup. Ct. 1953) (stating that the duty of an agent is to obey instructions of his principal and exercise reasonable skill and ordinary diligence); *Laub v. Genway Corp.*, 60 F.R.D. 462 (S.D.N.Y. 1973); *Franco v. Stein Steel & Supply Co.*, 179 S.E.2d 88 (Ga. 1970), *cert. denied* 402 U.S. 973 (1971); *Finnerty v. Frenchman*, 118 N.Y.S.2d 790 (N.Y. Co. Ct. 1952), *modified* 283 A.D. 970 (N.Y. App. Div. 1954).

261. See *DeMott*, *supra* note 200, at 301 n.51 (stating that an agent must protect the principal's confidential information from being used in a manner which benefits others or the agent even after the agency ends. "Confidential information includes any information that is not generally known and that either carries economic benefits for the principal, or could, if disclosed, otherwise damage or embarrass the principal"); KLEINBERGER, *supra* note 254, § 4.1.1, at 124-25 (stating that all confidential information acquired by agent during the relationship is safeguarded by the duty of nondisclosure and nonuse); see also SEAVEY, *supra* note 256, § 152, 249-50; *Dowrick*, *supra* note 253, at 39 (citing *Lamb v. Evans*, 1 Ch. 218. (1893)); RESTATEMENT (SECOND) OF AGENCY § 395-96.

262. See LEONARD LAKIN & MARTIN SCHIFF, *THE LAW OF AGENCY* 99, 101 (2d ed. 1996) (noting that as part of the duty of loyalty an agent must promptly inform his or her principal of all information related to the agency relation); *Dowrick*, *supra* note 253, at 39; RESTATEMENT (SECOND) OF AGENCY § 381.

263. See RESTATEMENT (SECOND) OF AGENCY §§ 385(1) cmt. a, 385(2) (recognizing that while "[t]he agent cannot properly refuse to obey on the ground that the obedience will be injurious to the principal's affairs," customs including professional ethics will be considered to determine the reasonableness of the principal's orders); *id.* § 250 cmt. a (acknowledging that the non-servant agent agrees sometimes to render services and sometimes to achieve results, but he does not surrender control over his physical actions. Factors, brokers, and attorneys at law represent the non-servant type of agents); *id.* § 383 (noting that an agent owes a duty to act only in "accordance with the principal's manifestation of consent" except when privileged to protect the agent's or another's interest); *id.* § 14 cmt. a ("The control of the principal does not, however, include control at every moment; its exercise may be very attenuated, and as where the principal is physically absent, may be ineffective.").

264. See SEAVEY, *supra* note 256, § 147, at 243 ("Except in the protection of superior or equal interests of his own or those of others, an agent has a duty to

comply with the law,<sup>265</sup> and (7) account for all actions.<sup>266</sup> Nonemployee or independent contractor agents<sup>267</sup> are agents who possess expertise and skill and, therefore, must exercise judgment and discretion in executing the

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act solely for the interests of his principal."); *id.* § 147A, at 243 ("The public interest protects an agent from doing an illegal act, whether he agreed to it; he cannot be required to misrepresent the quality of the goods he is selling."); *see also* RESTATEMENT (SECOND) OF AGENCY § 385 cmt. a (providing that an agent has no duty to perform acts which "are illegal or unethical, such as misrepresentation as to the qualities of goods sold"); *Hunter v. Payne*, 184 N.Y.S. 433, 436-37 (N.Y. Sup. Ct. 1920) *aff'd*, *Kinneary v. Parrett*, 188 N.Y.S. 930 (N.Y. App. Div. 1921) ("An agent is not liable for failing to do what the law does not permit, and he cannot be held accountable for failure to obey illegal instructions, or for failure to perform illegal acts"); *LAKIN*, *supra* note 262, at 98 (agent has no duty to obey instructions which are immoral, illegal, unethical, or against public policy); *DENNIS HYNES, AGENCY AND PARTNERSHIP* 203, 231 (3d ed. 1989) (same) (citing *SELL*, *supra* note 258, at 116). *See generally* *King v. Bankerd*, 492 A.2d 608 (Md. 1985); *KLEINBERGER*, *supra* note 254, § 4.1.3, at 129-30.

265. *See LAKIN & SCHIFF*, *supra* note 262, at 100 ("It is a fundamental rule of law that an agent must comply with the law no matter what the principal-agent contract otherwise provides."); RESTATEMENT (SECOND) OF AGENCY § 19.

266. *See Dowrick*, *supra* note 253, at 39 (the obligation to account to the principal also requires that property received from the principal be kept segregated: "[A]n agent who receives goods or money from or for his principal is bound to keep that property separate from his own and that of others"); *id.* at 30 (citing *Lupton v. White*, 15 Ves. 432 (1808)); *Burdick v. Garrick* L.R. 5 Ch. 233, 240 (1870); *see also* RESTATEMENT (SECOND) OF AGENCY § 382.

267. *See* RESTATEMENT (SECOND) OF AGENCY § 14N (stating that an agent not subject to the physical control of principal is an independent contractor; *see also* *RUSCHLEIN*, *supra* note 222, § 4, at 10-11, § 6B, at 12-13; RESTATEMENT SECOND OF AGENCY § 2(3) (independent contractor is the antithesis of servant.); *id.* § 218; *id.* § 385 cmt. a (stating that agents who are independent contractors such as attorneys are typically permitted a significant amount of freedom in determining how to accomplish the goals of the agency). The factors to be considered in determining whether an agent is a servant or an independent contractor are:

- (1) the extent of control which, by the agreement, the master may exercise over the details of the work;
- (2) whether or not the one employed is engaged in a distinct occupation or business;
- (3) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (4) the skill required in the particular occupation;
- (5) whether the employer or workman supplies the instrumentalities, tools and the place of work for the person doing the work;
- (6) the method of payment, whether by the time or by the job; . . .
- (7) whether or not the work is part of the regular business of the employer;
- (8) whether or not the parties believe they are creating the relation of master and servant; and
- (9) whether the principal is or is not in the business.

*Id.* § 220(2)(a-j).

principal's instructions.<sup>268</sup>

### C. Lawyer as Agent

Although modern commentators on lawyer role have largely ignored agency law,<sup>269</sup> authorities writing in the late 19th century and early 20th century viewed agency law as being at the core of lawyer role and professional ethics.<sup>270</sup>

"[A]n attorney is one that is set in the turn, stead, or place of another"; the term being synonymous with 'agent'.<sup>271</sup> The attorney-client relationship is created in the same way as all agency relations, by agreement.<sup>272</sup> The lawyer, as a fiduciary, must place the client's interest above all others, including her own.<sup>273</sup> The agent's duty of undivided loyalty<sup>274</sup>

268. See Dowrick, *supra* note 253, at 30 ("Agents . . . are generally chosen because the principal . . . has special confidence in the particular person selected."); RESTATEMENT (SECOND) OF AGENCY § 14N cmt. a; REUSCHLEIN & GREGORY, *supra* note 222, § 7E, at 16 (stating that attorneys are independent contractor agents who conduct transactions for principals); SEAVEY, *supra* note 256, § 3B, at 4 ("Attorneys at law, brokers, factors and auctioneers are special types of agents."); see also *id.* § 6B, at 8; RESTATEMENT (SECOND) OF AGENCY § 14N cmt. a.

269. But see *supra* note 200.

270. See W.B. HALE, PRINCIPLES OF THE LAW OF ATTORNEY AND CLIENT § 1 (1896) ("The relation existing between an attorney and his client is that of principal and agent."). For more recent authority, see Tremblay, *supra* note 200, at 518 n.12.

Fundamentally, a lawyer's authority to act on behalf of a client stems from her status as the client's agent. . . . This principle not only permits courts to hold parties liable for the negligence of their chosen counsel, but its accompanying effect is to deny the lawyer the power to act except under delegated authority, either explicit or implicit, from her principal.

*Id.*

271. See HALE, *supra* note 270, § 1 (quoting Co. Litt. 513).

272. *Id.* § 2; see REINHARD, *supra* note 129, § 415 ("The relation of attorney and client, like that of any other principal and agent, generally grows out of a contract of employment, which is called a retainer.").

273. See *Cox v. Sullivan*, 7 Ga. 144 (1849) (holding that "[a]n attorney is bound to the highest honor and integrity—to the utmost good faith" in all transactions with his client); HALE, *supra* note 270, at 5 ("The [attorney client] relation is a fiduciary one of the closest intimacy and is jealously guarded by the courts."); REINHARD, *supra* note 129, § 418, at 435 (recognizing that an attorney "[l]ike any other agent . . . is bound to observe toward his principal, the client, the utmost good faith; the relation between them is one of the most sacred and confidential that may exist between one person and another").

274. According to Sharswood: "[T]he great duty which the counsel owes to his client, is an immovable fidelity. Every consideration should induce an honest and honorable man to regard himself, as far as the cause is concerned,

requires the lawyer to be free from conflicting allegiances including self-dealing.<sup>275</sup> Lawyers, like other agents, are also bound by the duty to keep the client's secrets and confidences.<sup>276</sup> Like other agents, lawyers have a duty to exercise reasonable care in the performance of their duties, be reasonably knowledgeable, skilled,<sup>277</sup> and act assiduously.<sup>278</sup>

Lawyers use their expertise, judgment, skill, and discretion to accomplish the goals and objectives set by the client.<sup>279</sup> At common law, the lawyer had complete control

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as completely identified with his client." SHARSWOOD, *supra* note 90, at 117. But it was not completely unqualified. See *supra* note 109; cf. RESTATEMENT (SECOND) OF AGENCY § 387 (1958).

275. See generally HALE, *supra* note 270, § 5, at 16-17; REINHARD, *supra* note 129, § 418. This obligation, however, can be modified as long as its central character is retained. See also DeMott, *supra* note 200, at 317.

[The] relationship between the lawyer and the client is less susceptible to an agreement that varies the lawyer's duty of loyalty [because] [t]he lawyer's professional duties cast the lawyer in many respects as the guardian of the relationship, requiring the lawyer to use reasonable judgement to identify the client's interests and to educate the client as a prelude to the client's consent to otherwise problematic conduct. In contrast, agency law generally does not particularize what should constitute or precede the principal's agreement and does not require agents to educate the principal or to assure that the principal fully understands the import of the agreement"). Professor DeMott does not provide authority for this distinction. The fiduciary character of the agency relation would seem to prohibit the agent from knowingly entering an agreement with a principal who did not understand it.

*Id.*

276. See HALE, *supra* note 270, § 15, at 39-43; REINHARD, *supra* note 129, § 418, at 435-36; see also Mary C. Daly, *To Betray Once? To Betray Twice?: Reflections on Confidentiality, A Guilty Client, an Innocent Condemned Man, and an Ethics-Seeking Defense Counsel*, 29 LOY L.A. L. REV. 1611, 1617 (1996) (stating that a lawyer's confidentiality obligation is rooted in the fiduciary duties an agent owes to principal and noting that lawyers have two explicit sources for this obligation - the ethics rules and the attorney-client privilege - but they must divulge confidences and secrets if ordered to do so by a court). Confidential information in possession of other agents can also be protected from disclosure. See, e.g., FED. R. CIV. PRO. 26(c).

277. See generally HALE, *supra* note 270, § 7, at 13; *supra* note 261 and accompanying text for agent's duty of confidentiality.

278. See REINHARD, *supra* note 129, § 429, at 436 ("As in every other case of agency, it is the duty of an attorney at law to . . . pursue the task [of employment] diligently until completed.").

279. See SEAVEY, *supra* note 256, at 31.

An attorney-at-law normally has implied authority to use those procedures in the legal proceeding for which he is employed which reasonably appear to him to be best adapted to a useful conclusion and to incur the necessary expense. He has no implied authority to release



over the conduct of a lawsuit,<sup>280</sup> including the power to make stipulations,<sup>281</sup> admit facts,<sup>282</sup> waive technical advantages,<sup>283</sup> waive notice,<sup>284</sup> agree to extend time to file papers,<sup>285</sup> and to grant extensions.<sup>286</sup> Unless explicitly permitted, the lawyer does not possess authority to resolve any substantive rights of the client.<sup>287</sup>

The lawyer must be obedient to the client's instructions regarding goals and objectives.<sup>288</sup>

In many things [the lawyer] is bound at his peril to obey implicitly. Thus, if an attorney is instructed to sue on a claim placed in his hands, it is not for him to determine as to the wisdom of such a course: his duty is to obey; and for failure to do so, he will be liable for any loss the client may suffer, without regard to whether or not the attorney acted in good faith and did what he regarded as being in the best interest of the client.<sup>289</sup>

Lawyers, like all nonemployee agents, have considerable discretion in selecting the means with which to accomplish the client's goals.<sup>290</sup>

any substantive right of the client.

*Id.*

280. See HALE, *supra* note 270, § 3.

281. See *id.*

282. See *id.* § 3 n.42.

283. See *id.* § 3 n.43.

284. See *id.* § 3 n.44.

285. See *id.* § 3 n.49. See generally Fairchild v. Plank, 179 N.W. 64 (Iowa 1920).

286. See Hale, *supra* note 270, § 3 n.48.

287. See SEAVEY, *supra* note 256, § 31 ("An attorney-at-law . . . has no implied authority to release any substantive right of the client.").

288. See HALE, *supra* note 270, § 4 ("Except as to matters of minor detail, and those things about which the attorney possess special and technical information, it his duty to follow the instructions of his client; and" the failure do so could result in damages.") (citing Read v. Patterson, 11 Lea 430 (Tenn. 1883); Cox v. Livingston, 2 Watts & Serg. 103 (Pa. 1841)).

In case of doubt, it is the duty of counsel to advise his client what he believes is the best course to pursue; and if thereupon the client chooses to disregard the advice and pursue his own course, the attorney may safely follow the client's instructions, and it is perhaps safer for him to do so than otherwise.

*Id.*; see REINHARD, *supra* note 129, § 421, at 441.

289. REINHARD, *supra* note 129, § 421 (citations omitted).

290. See *id.* ("But in the absence of specific instructions, the attorney always has a wide discretion, and where he acts in good faith and according to what his judgement dictates as the wisest course to pursue no liability attaches if loss should ensue.") (citing Webb v. White, 18 Tex. 572 (1857); Morrill v. Graham, 27 Tex. 646 (1864); Bennett v. Phillips, 57 Iowa 174 (1881); Pennington v. Yell, 11

### III. THE IMPLICATIONS OF THIS ANALYSIS

#### A. *The Duty of Obedience is Paramount*

If lawyers have a duty to seek justice inconsistent with duties of loyalty and zealousness to clients, it ought to be grounded in something more than the discomfort some commentators feel when the law permits activity that they find offensive. Because the duty to seek justice cannot be based in the lawyer's "officer of the court" role, perhaps another candidate is agency law. After all, it is agreed that attorneys are agents for most purposes, and agency law forbids agents from engaging in conduct that is illegal, unethical, immoral, or against public policy. Moreover, lawyers as nonemployee agents have the discretion to select the means to accomplish the client's goals. Can agency law provide a home for advocates of the duty of lawyers to seek justice? To answer that question we need to determine whether lawyer role in an adversary system would admit of such a duty. Would imposing a duty upon the lawyer to seek justice be too inconsistent with basic concepts of agency law to be functional?

The term "illegal" means that an agent may not commit crime on behalf of her principal. The lawyer's status as agent does not permit lawyers to commit torts, violate contract law, or violate any other area of law.<sup>291</sup> The term "illegal" does not provide solace to those who seek to impose upon lawyers a duty to seek justice. But the terms "unethical", "immoral", and "against public policy" may hold more promise.

Unethical conduct seems limited to mis-

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Ark. 212, 228 (1850)).

291. See, e.g., *Ford v. Wisconsin Real Estate Examining Bd.*, 179 N.W.2d 786, 792 (Wis. 1970) (holding that an agent cannot violate civil rights statutes 42 U.S.C. § 1982, dicta); RESTATEMENT (SECOND) OF AGENCY § 343 (1958) (stating that status as agent does not protect agent from tort liability; however, agent may benefit from privilege of principal); *id.* § 411 (stating that an agent is not liable for failing to obey instructions to perform illegal acts). See generally *Munday v. Whissenhunt*, 90 N.C. 458 (1882) (holding that an immoral or iniquitous contract will not be enforced); Crystal, *supra* note 42; Perillo, *supra* note 42; John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"? Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193 (1991).

representations,<sup>292</sup> self-dealing or other behavior conflicting with the agent's fiduciary duties.<sup>293</sup> Immoral conduct and conduct that is against public policy seem limited to behavior sanctioned by criminal, or quasi criminal, statutes or regulations. These terms apply to conduct involving alcohol,<sup>294</sup> gambling,<sup>295</sup> and prostitution.<sup>296</sup> None of this conduct is the object of serious interest to those advocating that the lawyer's role should include a substantive duty to seek justice.

Agency law, however, can not provide a haven for those who support a role for lawyers that includes a substantive duty to seek justice for a more important reason; such a role is inconsistent with the very concept of an agent. The duty of obedience is intrinsic to the role of agent. Agents owe the principal obedience and they are not permitted to act in a manner that is at odds with the principal's lawful goals.<sup>297</sup> All other fiduciary actors determine the best interests of their charges and act accordingly.<sup>298</sup> Agents, on the other hand, are different—they ascertain the principal's goals and act to accomplish them. The agent cannot say, "your goal is completely lawful and can be attained, but I think it is unwise or immoral and I will not accomplish it." Of course, the agent need not accept the employment and can under certain circumstances terminate the relationship with the principal.

The same is true for lawyers. A substantive duty to seek justice, when inconsistent with the client's lawful instructions, is fundamentally incompatible with the

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292. See, e.g., *Waggoner v. Western Carolina Pub. Co.*, 130 S.E. 609 (N.C. 1925) (holding that defendant was liable when agent's fraudulent representations induced plaintiff to enter contest).

293. Cf. MODEL RULES, *supra* note 1, Rules 1.7-1.10.

294. See, e.g., *Arras et al. v. Richardson*, 5 N.Y.S. 755 (City Ct. N.Y., General Term 1889) (holding that in action against surety on lease, defense was that premises were leased for "illegal and immoral purposes"; specifically, the sale of liquor without a license. Because such conduct was criminal, principal had to be shown to have personal knowledge thereof).

295. In most jurisdictions gambling remains a criminal offence unless sponsored by the State.

296. Prostitution is a criminal offence in almost every jurisdiction.

297. *Gilbert v. Williams*, 8 Mass. 51, 51 (1811) ("Whenever an attorney disobeys the lawful instructions of his client, and a loss ensues, for that loss the attorney is responsible.").

298. Of course, the beneficiary of the fiduciary's responsibilities may be consulted and in some cases age and maturity may be especially relevant, but in the end the fiduciary must determine and act in the best interest.

attorney's role as agent in the adversary system as we know it. Imposition of duties that clash with the duty of loyalty to client—in effect agency duties to the court or justice—would dramatically redefine the agency concept and lawyer role. Part of the lawyer's role is providing access to the law by ensuring that the client's cause is fully developed and heard.<sup>299</sup> This procedural purpose is at the heart of the lawyer's function in our adversary system, but it arises from the core agency rule that the agent must be obedient to the instructions of the principal. The client sets the goals and the lawyer simply tries to accomplish them.

Following client instructions is central to both lawyer and agent role, but obedience does not mean that the lawyer must follow any and all lawful instruction.<sup>300</sup> Because of expertise, training, skill, and judgment,<sup>301</sup> the lawyer has considerable license in selecting the means to accomplish the client's goals, subject to only two general conditions: (1) Lawyers may decline to abide by client instructions<sup>302</sup> that may interfere with, or do not promote,

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299. See Pepper, *supra* note 163.

300. See Read v. French, 28 N.Y. 285 (1863) ("But a client has no right to control his attorney in the due and orderly conduct of a suit, and it is his duty to do what the court would order to be done, though his client instruct him otherwise.").

301. See Wasserstrom, *supra* note 19, at 7 (stating that most clients come to lawyers for the lawyers' special competence and skill). See generally SHARSWOOD, *supra* note 90.

302. The distinction between means and objectives can be illusive. See MODEL RULES, *supra* note 1, Rule 1.2. Consider the following hypothetical: Suppose the lawyer said to the client: "We have no chance of winning if we do not call your 86 year old frail and sickly father (who will also be vulnerable on cross-examination) to testify at trial." If the client responds "Don't call my father as a witness, I don't want to embarrass him and I'm worried about his health," has she changed her goals such that the lawyer is obligated to obey? By insisting that the father not be called, one could say that the client has waived achievement of her previous goals or changed them. On that view, it is her right to do so. The lawyer as agent has no right to insist that the witness be called because victory will vindicate the attorney's values. Alternatively, one could take the view that selection of witnesses is the means by which the lawyer attains the client's goals and therefore the decision is the lawyers. This subject may be further complicated by the nature of the fee arrangement. The distinction between means and objectives is, however, beyond the scope of this Article. See generally David B. Wilkins, *Do Clients have Ethical Obligations to Lawyers? Some Lessons from the Diversity Wars*, 11 GEO. J. LEGAL ETHICS 855, 875-76 (1998); Robert H. Aronson, *An Overview of the Law of Professional Responsibility: The Rules of Professional Conduct Annotated and Analyzed*, 61 WASH. L. REV. 823 (1986).

accomplishment of the client's goals<sup>303</sup> and (2) decline to engage in wrongdoing.<sup>304</sup>

### B. *The Duty of Candor*

Recognition that lawyers are agents and have no substantive duty to seek justice does not mean that lawyers are required to act or advise only in terms of black letter law.<sup>305</sup> Notwithstanding the frequent disparaging references to lawyers as "hired guns," the lawyer as agent also owes the client the duty of candor.<sup>306</sup> The attorney's counseling function fully epitomizes this duty of candor.<sup>307</sup> The

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303. See *Jones v. Barnes*, 463 U.S. 745 (1983). *Jones* is an example of an agent refusing to follow the principal's instructions because he believed to do so would make the accomplishment of the principal's goals less likely. Although agency law is not expressly discussed, the case involves an assigned attorney for a criminal defendant refusing to follow the client's direction to brief and argue several issues. The Court held that the Constitution did not require the lawyer to argue all of the client's points on appeal. The case is complicated by Constitutional issues, the fact that counsel was assigned rather than retained, and the obvious consequences of losing for the client. From an agency law perspective, however, the Court's decision is easier to understand. The nonemployee agent made a decision based upon his expertise that the principal's goals were more likely to succeed if the appeal were conducted in a certain way. Under agency law, the agent had no obligation to follow those instructions of the principal.

304. See Pepper, *supra* note 163, at 1545, for a thoughtful discussion on the scope of wrongdoing; see also John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193 (1991).

305. As noted, the law governing lawyers like everyone is not limited to conduct exclusively punished by the criminal law.

306. Cf. Model Rules, *supra* note 1, Rule 2.1. In the words of George Sharswood:

Under all circumstances, the utmost candor should be used towards the client. . . . It is fair that he should know it; for he may not choose to employ a man whose views may operate to check his resorting to all lawful means to effect success. Besides, most men, when they consult an attorney, wish a candid opinion; it is what they ask and pay for.

SHARSWOOD, *supra* note 90, at 107-08.

307. Justice Louis Brandeis's statement: "Advise client what he should have—not what he wants" is a good example of the duty of candor and counseling. P. STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE 40 (Letter to William H. Dunbar, February 2, 1893) (1984). See generally, *Nave v. Baird*, 12 Indiana 318 (1859) (holding that an attorney should advise a client to the best of his judgment, and if the client refuses to follow his advice, counsel is better off following the client's instruction as far as the rules of law will allow). Cf. RESTATEMENT (SECOND) AGENCY § 385 (1958).

components of this function include dispassion,<sup>308</sup> independence,<sup>309</sup> skill,<sup>310</sup> and judgment. Agents are obligated to be completely straightforward about the wisdom of the principal's objectives.<sup>311</sup> Because of their expertise, this responsibility fits perfectly within the construct of the agent as nonemployee agent or independent contractor. Candid expertise is, after all, the reason the principal seeks an agent in the first place.<sup>312</sup>

While it is improper for the lawyer to refuse to attain the client's lawful objective goal because the lawyer preferred a different goal, candor and counsel are entirely consistent with the lawyer's purpose as agent.<sup>313</sup> The duty of candor allows the lawyer to discuss the matter broadly,<sup>314</sup> exploring options from many perspectives, however, it does not permit the imposition of the lawyer's values or morals on the client.<sup>315</sup> Through counseling, therefore, concerns of "moral activists" about some of the harsher consequences of the "standard conception" of lawyering may well be mitigated.<sup>316</sup>

The proposals of the moral activists differ in some respects, but they share the common view that the lawyer has the right to refuse to follow the client's lawful

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308. See generally BINDER, BERGMAN & PRICE, *LAWYERS AS COUNSELORS: A CLIENT CENTERED APPROACH* (1991) [hereinafter BINDER].

309. See *id.*; see also MODEL RULES, *supra* note 1, Rule 2.1; MODEL CODE, *supra* note 8, DR 5-107(B).

310. See, e.g., BINDER, *supra* note 308. See generally Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717 (1987); ROBERT W. BASTRASS, *INTERVIEWING, COUNSELING, AND NEGOTIATION* (1990); Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501 (1990).

311. See *In re Loring*, 374 A.2d 466, 470 (N.J. 1977) (holding that it is the attorney's "duty to advise the client fully, frankly, and truthfully of all material and significant information"); see also *Stockton v. Ford*, 52 U.S. 232, 247 (1850).

312. See generally SHARSWOOD, *supra* note 90; Wasserstrom, *supra* note 19.

313. See generally Pepper, *supra* note 163, at 1545 (discussing importance of client autonomy and counseling). Much has been written about the risks of the lawyer manipulating the client. See BINDER, *supra* note 308. That subject is, however, beyond the scope of this article.

314. See MODEL RULES, *supra* note 1, Rule 2.1 (allowing attorney to counsel regarding legal and "moral, economic, social and political factors"); MODEL CODE, *supra* note 8, EC 7-8.

315. Much has been written on the dangers of paternalism. See, e.g., Wasserstrom, *supra* note 19.

316. Both terms have been used by David Luban and others in this debate. See, e.g., Luban, *Partisanship*, *supra* note 24. See generally Serena Stier, *Legal Ethics: The Integrity Thesis*, 52 OHIO ST. L. J. 551 (1991).

instructions regarding objectives when the lawyer believes the objectives are immoral. Proponents of moral activism have simply ignored or misapprehended the application of agency law to the lawyer role and grossly exaggerated the lawyer's role as an "officer of the court." The lawyer's role as officer of the court does not (and could not) embrace a substantive duty to seek justice because, as agents, lawyers owe their clients the duty of obedience.<sup>317</sup> Once the lawyer role permits the lawyer's views about morals and values to be the basis for refusing to obey lawful client instructions, the role of lawyer has been transformed from that of agent to that of judge.

Without seeking to trivialize the discomfort felt by some commentators and lawyers caused by a conflict between their morals and obedience to lawful client instructions, allowing lawyers to act on the own beliefs at the expense of the client's rights is not the solution. One solution is law reform. For example, reforming the Statute of Limitations<sup>318</sup> and other laws whose applications are perceived by the moral activists to be unfair would be a great public service (if you agree). Another answer for lawyers who experience discomfort is to find positions such as a prosecutor or judge that are less likely to cause discomfort.<sup>319</sup> Finally, perhaps these individuals should consider another line of work.<sup>320</sup>

Lawyers should not be allowed to determine for themselves where justice lies and then impose it on the client (or withdraw). This would in the words of Judge Sharswood, be "unjust and indefensible, [and] usurp . . . the functions of both judge and jury"<sup>321</sup> or in the words of

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317. See generally Gaetke, *supra* note 6; Rhode, *supra* note 28 (discussing how some commentators have recognized that the officer of the court characterization does not contain a substantive duty to seek justice but urge that substance be placed in it.) As long as lawyers are agents and our system is adversarial, however, the lawyer cannot play such a substantive role without a profound change in the lawyer's role as we know it.

318. The Statute of Limitations has been singled out by commentators as unjust as early as David Hoffman. See *supra* notes 83-89 and accompanying text; SHARSWOOD, *supra* note 90. See generally Simon, *supra* note 23. Hoffman and Simon would not assert it, Sharswood would. See *id.*

319. Cf. Simon, *Ethical Discretion*, *supra* note 26 (using the role of the prosecutor to illustrate his argument for ethical discretion).

320. Cf. *Norris v. Lee*, No. 93-0441, 1994 WL 143119, at \*1 (E.D. Pa. Apr. 15, 1994).

321. See SHARSWOOD, *supra* note 90, at 83-84. The word "impose" was chosen specifically to contrast it with the lawyer's counseling responsibilities. Expertise and judgment are two qualities the client seeks in a lawyer.

Professor Wasserstrom: "The private judgement of individual lawyers would in effect be substituted for the public, institutional judgement of the judge and jury."<sup>322</sup>

A powerful expression of the lawyer's role as agent in the adversary system, and the absence of any duty as an "officer of the court" to seek justice, provides the fundamental thesis of this Article.<sup>323</sup>

As professional trial lawyers, hired courtroom gladiators, they cannot always expect to be favored with heartwarming luxury of knowing for a fact that their clients are the ones in the right. They simply get hired to go into court and fight the good fight. That they might not be on the side of right is no more their concern than that of a literally hired gun—a soldier of fortune—who finds himself employed purely for the purpose of waging and winning a war, and for whom the underlying political and philosophical merits of that war are of no great concern. . . . *Lawyers serve not as a judge or jury, but as stewards of their clients cause, and as such, in our adversary system, they serve a vital purpose, giving litigants the process that is their due.* They need not like the client, or the client's cause, any more than a surgeon need like the patient or the patient's self-inflicted disease, in order to perform their task as professionals.<sup>324</sup>

### CONCLUSION

Historically, lawyers have made important contributions to society and played prominent roles in government, but when they represent clients lawyers are agents. This Article shows the rhetoric surrounding the label "officer of the court" to be conceptually empty. There is virtually no significant duty owed by the lawyer to the court that is both inconsistent with the basic duty of fidelity that is owed to the client or is different than duties non-lawyers also owe to the court. Continuing to rely on the lawyer's role

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322. Wasserstrom, *supra* note 19, at 10.

323. The Court's statement is in response to an attorney's request to withdraw because of concerns about possible witness tampering and the truthfulness of the client's cause. As so often occurs, the Court drew upon the "hired gun" metaphor which ignores the lawyer's substantial role as counselor.

324. Norris, 1994 WL 143119, at \*1 (emphasis added). Consistent with this warrior metaphor, the Court observed: "The reality is that the professional advocate who gets too quickly squeamish at the thought of representing a less than utterly lustrous cause might wish to consider another line of work." *Id.* at \*1.



as an "officer of the court" as support for a substantive duty to seek justice is a profound self-serving misrepresentation of lawyer role, that misleads clients, the public, and lawyers themselves.

This tradition of speaking and acting on behalf, and at the direction of others in legal proceedings stretches back from medieval England to ancient Greece and Rome. As agent, the lawyer is not morally accountable for the merits of the case. The lawyer as agent has no substantive duty to seek justice; her duty to the court is entirely procedural and consistent with duties to the client. For those moral activists who are uncomfortable with the tension that exists when there is a difference between what the law allows and their morality and values the answer is urging law reform or another occupation. The answer is not for moral activists to deny clients access to the law, or worse, to substitute their views of morality in place of the law.

Lawyers are agents and have been so for quite some time. Lawyers owe a duty of loyalty and obedience to the client as agents. Lawyers in our adversary system can not be burdened with special responsibilities to seek justice that are inconsistent with duties to clients and greater than those of non-lawyers without profoundly changing the basic nature of the lawyer's role.

